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# SELECTED DECISIONS

OF THE

# COURT OF

# SUDDER DEWANEE ADAWLUT

OF

# BOMBAY.

COMPILED BY

JAMES MORRIS,

FIRST ASSISTANT REGISTRAR AND REPORTER OF CASES TO THE SUDDER ADAWLUT.

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PART II. 1848—1850.

Bombay:

PRINTED FOR THE GOVERNMENT,

AT THE

BOMBAY EDUCATION SOCIETY'S PRESS.

1852.

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# ADVERTISEMENT.

THIS Second Part of "Selected Decisions of the Court of Sudder Dewanee Adawlut," by the present Reporter, and the Part which immediately preceded it in publication, form a connected whole, which would have been published together, had not an alteration in the form as the compilation proceeded caused the present Reports to be withheld until they could be remodelled. Both Parts embrace a period of about three years, namely from about the close of 1848 up to the beginning of 1852; and the Reports they contain have been selected from a body of Cases amounting to 459, decided by the Court during that time, the choice being confined to such Cases as involved points that would serve as precedents, or tend to elucidate the Judicial Administration of the country, and the character and customs of the people.

*Sudder Dewanee Adawlut,*
18*th September* 1852.

# LIST OF THE JUDGES

OF THE

# COURT OF SUDDER DEWANEE ADAWLUT,

*Present during the period over which the Reports in this Collection extend.*

---

## In 1848.

The Hon'ble Lestock Robert Reid, Chief Judge.
Alexander Bell, Puisne Judge.
William Simson, Puisne Judge (on leave for four months from 27th June).
Benjamin Hutt, Puisne Judge.
Philip William LeGeyt, Puisne Judge.
Gregor Grant, Acting Puisne Judge (in the room of Mr. Simson).

## In 1849.

The Hon'ble Lestock Robert Reid, Chief Judge (resigned the Service 1st March).
The Hon'ble John Pollard Willoughby, Chief Judge (in the room of Mr. Reid).
Alexander Bell, Puisne Judge.
Benjamin Hutt, Puisne Judge (on furlough for three years from 1st May).
John Warden, Puisne Judge (in the room of Mr. Simson).
Gregor Grant, Puisne Judge (in the room of Mr. Hutt).

## In 1850.

The Hon'ble John Pollard Willoughby, Chief Judge.
Alexander Bell, Puisne Judge (since appointed Chief Judge in the room of Mr. Willoughby).
John Warden, Puisne Judge.
Philip William LeGeyt, Puisne Judge.
Gregor Grant, Puisne Judge.

# LIST OF THE CASES REPORTED,

*According to their Numbers.*

---


| | | PAGE |
|---|---|---|
| No. | 2214 | 95 |
| „ | 2215 | 147 |
| „ | 2293 | 11 |
| „ | 2374 | 81 |
| „ | 2375 | 29 |
| „ | 2376 | 1 |
| „ | 2377 | 24 |
| „ | 2378 | 49 |
| „ | 2388 | 113 |
| „ | 2389 | 19 |
| „ | 2391 | 60 |
| „ | 2393 | 37 |
| „ | 2394 | 45 |
| „ | 2395 | 15 |
| „ | 2396 | 39 |
| „ | 2399 | 68 |
| „ | 2400 | 121 |
| „ | 2401 | 34 |
| „ | 2403 | 42 |
| „ | 2404 | 63 |
| „ | 2405 | 72 |
| No. | 2407 | 83 |
| „ | 2408 | 79 |
| „ | 2409 | 86 |
| „ | 2410 | 91 |
| „ | 2411 | 31 |
| „ | 2412 | 88 |
| „ | 2413 | 124 |
| „ | 2414 | 104 |
| „ | 2420 | 110 |
| „ | 2444 | 142 |
| „ | 2445 | 93 |
| „ | 2448 | 132 |
| „ | 2452 | 99 |
| „ | 2455 | 46 |
| „ | 2473 | 128 |
| „ | 2474 | 139 |
| „ | 2518 | 108 |
| „ | 2522 | 106 |
| „ | 2551 | 117 |
| „ | 2552 | 100 |

# LIST OF THE CASES REPORTED,

*According to the Names of the Parties.*

---


## A

PAGE

Abdoobhaee Bakurbhaee and others *versus* Ubjul Usruf..... 15
Anundrow bin Ramrow *versus* E. M. Suart..... 88

## B

Bapoorow *versus* Ramabaee..... 37
Bapoo wulud Mahomed Ali *versus* Oomerkhan wulud Daoodkhan. 142
Busupa Turulgutee *versus* Gowdshanee Nugdee..... 34

## D

Dowlutram Muncharam and others *versus* Collector of Ahmedabad..... 19
Duneshwur Deoshunkur *versus* Deoshunkur Doolubram..... 63

## F

Fawcett, E. G., *versus* Bapoo Pragjee..... 63

## G

PAGE

Gunputram Atmaram *versus* Baee Bhowanee and others..... 32

## H

Hurry Ramchunder *versus* Trimbuk Yeshwunt..... 49

## I

Ishmaljee wulud Manoodjee and another *versus* Hooseinjee wulud Abdooljee and others..... 139

## J

Jahangeerbhaee Munchershah *versus* Nuserwanjee Muncherjee.. 81
Jiva Bechur *versus* Mobut Nuthoo 117
Jugunath Anund *versus* Mahadajee Ramchunder..... 110

## K

Kandass Hunsraj and others *versus* Damotherdass Govurdundass... 104

PAGE

Kishundass *alias* Kucherdass and another *versus* Kesoo wulud Bapoojee Patel..... 108
Krishnabaee *versus* Ramchunder. 83
Kupoorchund Huruckchund *versus* Dadabhoy Rutunjee.. ... 126

L

Luxmundass Shunkurdass and another *versus* Rowjee Abajee Gorboleh ..... 121

M

Muthooradass Gordundass and another *versus* Laldass Nurhurdass and others..... 113

N

Nainsook Anundram and others *versus* Girapa wulud Jakapa.. 60

P

Pandoorung Baborow *versus* Sudgoorow bin Bangoorow..... 31
Pandoorung Baborow *versus* Naro bin Sobanjee..... 86
Purshotumdass Maniklal *versus* Chotumlal Meherchund..... 128

R

Ramchunder Anunt *versus* Ramsalvee ..... 19

PAGE

Runchore Wulubram *versus* Kaseeram Hurrybhaee and others.. 132

S

Shreerung Lukminath *versus* Oomerbhaee and another..... 11
Sidapa *versus* Sidoo Govind..... 42
Sudasew Bikajee *versus* Sorabjee Rutunjee..... 24
Sujunbhaee wulud Rahimbhaee *versus* Govind Trimbuk and others..... 124
Suntoo wulud Maduck and others *versus* Babajee and others..... 68

V

Veerpukshapu *versus* Buswuntapa 45
Virbudru Hurrybudru *versus* Baee Ranee and others..... 1
Vitul Mulhar *versus* Gungathur Mulhar..... 46

W

Wuzeer Mahomed *versus* Wuzeerboo..... 29

Y

Yemoonabhaee, wife of Shamrow Somunt, *versus* Umrootrow Myput Somunt..... 106

# EPITOME OF CONTENTS.


## No. 2376, Special.

VIRBUDRU HURRYBUDRU, Appellant, *versus* BAEE RANEE, Wife of BALKRISHUN VENAEK, and her Sons RUTUNKRISHUN, GUNGAKRISHUN, and VEJUKRISHUN, Respondents.

Held in the case of a Hindu widow of the Nagur Brahmin caste, who had adopted a son, that it was not essential that she should have obtained the authority of her husband to make the adoption valid..... p. 1

## No. 2293, Special.

SHREERUNG LUKMINATH, by his Mooktiar HURBAJEE WITUL, Appellant, *versus* OOMERBHAEE, deceased, and KASUMBHAEE, Sons of SADUKBHAEE, Respondents.

Held that a claim to a Wurshasun Allowance, brought eleven years after it was due, was barred under the Regulation of Limitations, the plaintiff holding no written acknowledgment from the defendant..... p. 11

## No. 2395, Special.

ABDOOBHAEE BAKURBHAEE, REMOOBHAEE HUSUNBHAEE, UKRUMBHAEE OOMUBHAEE, and UMEEJEE WULUBHAEE, Appellants, *versus* UBJUL USRUF, Respondent.

A certificate of Special Appeal should be precise in stating the matter certified for inquiry..... p. 15

## No. 2389, Special.

DOWLUTRAM MUNCHARAM, deceased, his Heirs, PURTABHAEE, HURRAEE, and SUNTOOKRAEE, Sons of DOWLUTRAM, the latter a Minor, Appellants, *versus* E. G. FAWCETT, Esq., Collector of Ahmedabad, Respondent.

A Magistrate having warned certain parties that their building was encroaching on public ground, they entered an action against him to remove his obstruction, but were nonsuited, as they had failed to establish their title, which it was presumed was their object, and it being held that the *onus probandi* rested on them..... p. 19

## No. 2377, Special.

SUDASEW BIKAJEE RANARE, by his Mooktiar VISHNOO GOVIND LIMAJEE, Appellant, *versus* SORABJEE RUTUNJEE, Parsee, Respondent.

Held that a younger brother, as Agent or Manager, is competent to mortgage family property in the absence of his elder brother, and that even if a partition had taken place he could still mortgage his brother's share..... p. 24

## No. 2375, Special.

WUZEER MAHOMED PAYAR MAHOMED, Appellant, *versus* WUZEERBOO, Daughter of NOOR MAHOMED, Respondent.

Held in the case of a Mahomedan mother, who had been divorced from her husband, and who was not shown to be of bad character, that her claim to the guardianship of their daughter, up to the age of 9 years, was superior to that of the father..... p. 29

## No. 2411, Special.

PANDOORUNG BABOOROW, Appellant, *versus* SUDGOOROW BIN BANGOOROW, Respondent.

By Hindu law, a son cannot sign for the father without his father's mark, or a written special power from him..... p. 31

## No. 2401, Special.

BUSUPA TURULGUTEE, Appellant, *versus* GOWDSHANEE UNGDEE, Respondent.

Held that a security may be sued for payment of a debt, and that it is not obligatory to proceed first against the principal, or to proceed against the principal and security together..... p. 34

## No. 2393, Special.

BAPOO ROW SHOLAPOORKUR, Appellant, *versus* RUMABAEE DESAEEN, Respondent.

Held that it is unnecessary to sue on a stamp that will cover the whole amount of an instalment bond, in seeking to recover such instalment or instalments as may be due thereon at the time of suing..... p. 37

## No. 2396, Special.

GUNPUTRAM ATMARAM, Appellant, *versus* BAEE BHOWANEE, Widow of DUYASHUNKUR, LAKA JUYRAM, UMBAEEDASS BHUGWAN, and BHUGDA KULIAN, Respondents.

In a suit for the possession of some land, founded on a deed of gift, the plaint was dismissed by the Zillah Judge as irregular, in that the claim was not laid as prescribed in Section III. Regulation IV. of 1827, and because all the property mentioned in the deed was not included in it; but in the Sudder Dewanee Adawlut it was held that these objections were invalid..... p. 39

## No. 2403, Special.

SIDAPA WULUD HIRAPA, and SOMUNA WULUD YELAPA, Appellants, *versus* SIDOO GOVIND KOOLKURNEE, Respondents.

Held that by the established usage of the country a *Mirasdar* cannot be deprived of his *miras* land in consequence of absence from it, however long. ..... p. 42

## No. 2394, Special.

VEERPUKSHAPA PUTUNSHETEE, Appellant, *versus* BUSWUNTAPA PUTUNSHETEE, Respondent.

Held that it was not against the practice of the Courts to reject a claim to a share in a *Watun*, on the ground that the defendant, who claimed it as an adopted son, had been in possession four years, during all which time the plaintiff, who claimed equal right in it with the defendant, did not question his tenure, and could not show any reason for his supineness..... p. 45

## No. 2455, Special.

VITUL MULHAR PUNDIT, deceased; his son and Heir RAOJEE, also deceased; his Sons and Heirs TATIA and TRIMBUK, Minors, by their Mother, who was also their Guardian, RADHABAEE, and by GUNESH VITUL, Appellants, *versus* GUNGATHUR MULHAR PUNDIT, Respondent.

Held that the law requires that all the facts of a case must be assumed as stated in the decree, and that a special appeal cannot be admitted to correct an error in the determination of facts, even if the judgment appear inconsistent with, or contrary to, the evidence..... p. 46

## No. 2378, Special.

HURRY RAMCHUNDER KANCH, Appellant, *versus* TRIMBUK YESHWUNT KANCH, Respondent.

Held in a claim to a right of way over ground falling under the eaves of a building which the plaintiff had sold, that as the right existed before the sale, and was not expressly conceded in the deed of sale, it must be presumed that it was reserved..... p. 49

## No. 2391, Special.

NAINSOOK ANUNDRAM, deceased, his Heir DHUMBAEE *alias* PHOOLBAEE, also deceased, her Heir SOOBARAM NAINSOOK, deceased, his Heirs SOOJANBAEE KOM ANUNDRAM, and ROOKMABAEE KOM SOOBARAM, Appellants, *versus* GIRAPA WULUD JAKAPA, Respondent.

Held in a case in which only a part of the claim was awarded, and the whole of the costs were made to fall on the defendants, that it was competent so to do under the provisions of Clauses 2nd and 3rd of Section LVIII. of Regulation IV. of 1827..... p. 60

No. 2404, Special.

DUNESHWUR DEOSHUNKUR, Appellant, *versus* DEOSHUNKUR DOOLUBHRAM, Respondent.

Relative rights of descendants in the male and female lines, in respect to inheriting property according to Hindu law..... p. 63

No. 2399, Special.

SUNTOO WULUD MADNAK, KRISHNA WULUD DEONAK, SUTWA WULUD RANNAK, GONNAK WULUD DHONDNAK, and CHANDNAK WULUD HUNAK, Appellants, *versus* BABAJEE BIN SHRIPUTROW, VENKUTROW BIN JANROW, GUNOJEE BIN MATURJEE, and ROWJEE BIN RUVLOJEE, Respondents.

Held in a case instituted by some village *Mahars*, that they could not claim the skins of draught bullocks dying in the village, but must make them over to the owners of such animals, receiving remuneration for their services in skinning them..... p. 68

No. 2405, Special.

E. G. FAWCETT, Esquire, Collector of Ahmedabad, Appellant, *versus* BAPOO PRAGJEE, Respondent.

Held that the manner in which a Collector is to proceed in the resumption of land belonging to Government, found in the occupation of another party, is that which is prescribed in Chapter X. of Regulation XVII. A. D. 1827..... p. 72

No. 2408, Special.

RAMCHUNDUR ANUNT KOLUTKUR, Appellant, *versus* RAMSALVEE BIN BHAMSALVEE, Respondent.

Instalments which may be overdue on a bond may be sued for separately..... p. 79

No. 2374, Special.

JAHANGHEERBHAEE MUNCHURSHAH, Appellant, *versus* NUSURWANJEE MUNCHERJEE, Respondent.

Held in a claim under a mortgage deed, the date of which was beyond the period of limitation, to recover interest provided for by an endorsement on the deed, whose date was within the period, that the endorsement was not such an admission of the justice of the demand (contemplated in Clause 1st, Section VII. Regulation V. of 1827) as would allow of the transaction being reckoned from the date of it..... p. 81

No. 2407, Special.

KRUSTNABAEE KOM KUNDOO DADAJEE, Appellant, *versus* RAMCHUNDUR BHUGWUNT, Respondent.

Held in a claim founded on an instalment bond, the date of which was beyond the period of limitation, that the instalments falling due within the period were recoverable. p. 83

## No. 2409, Special.

PANDOORUNG BABOOROW, Appellant, *versus* NAROO BIN SOOBANJEE, deceased, his Heir HURRY BIN NAROO, a Minor, by his Mother, who was also his Guardian, BHAGEERTHEEBAEE, Respondent.

In a suit entered by a *khot* on a *kuboolayut* passed by his tenant, it was held in special appeal by the Sudder Dewanee Adawlut, that it was not necessary that the instrument should be on stamped paper, the plaintiff being *khot*, or landlord, and the *kuboolayut* relating to rent..... p. 86

## No. 2412, Appeal.

ANUNDROW BIN RAMROW, Mukadum Patel, Appellant, *versus* E. M. SUART, Esquire, Assistant Collector in Charge, Sholapoor, Respondent.

Held that the Civil Court has no jurisdiction in a claim to an *inam* in the Deccan, under Clause 1st, Section VI. of Regulation XXIX. of 1827..... p. 88

## No. 2410, Special.

BUHOODEENSHA WULUD ALISHA, Appellant, *versus* RUMBAJEE WULUD POOTAJEE, Respondent.

Held in a claim to precedence in the procession of *taboots* at the *Mohurum*, that the matter was not cognizable by the Civil Court, but came within the jurisdiction of the Magistrate..... p. 91

## No. 2445, Special.

BAJEE SUDSHET, Sonar, Appellant, *versus* PANDOORUNG RAMCHUNDUR, Respondent.

Held in the case of two brothers, who lived separate, but were undivided in interests, that the sale of a portion of the family property by one of them, without the consent of the other, was null and void by Hindu law..... p. 93

## No. 2214, Appeal.

SURUSWUTHEEBAEE, Wife of GUNESH RUGOONATH UNGUR, Appellant, *versus* ROWJEE BAPOOJEE UNGUR, Respondent.

A and B entrusted their brother, C, with certain monies, for the performance of the funeral ceremonies of their mother; but, as he did not carry out their intentions, D, the heir of A, instituted a suit for the recovery of his share of the advance, when it was held that the only claim he had, as head of the family, was to the enforcement of the deed of trust in the matter..... p. 95

## No. 2452, Special.

BHAEECHUND NUNDLAL, Appellant, *versus* MOTEERAM NARUNDASS, Respondent.

Held in a suit which the lower Court decided should be dismissed under Section XXV. of Regulation IV. of 1827, because it had been adjudicated once before, that as

it had only been struck off the file for non-appearance on the first occasion, the plaintiff was entitled to bring a new action in the matter..... p. 99

## No. 2552, Special.

PETAMBER and BHAEESHUNKER, (Sons of NUTHOO,) Minors, by their Mother, who was also their Guardian, BAEE AMBER, Appellants, *versus* JETHA GIRDHUR, a Minor, by his Mother, who was also his Guardian, BAEE SUDA, Respondent.

Held in this case that a mortgage was not affected by a subsequent sale, and that as the deed of mortgage was not in the possession of the purchaser, the mortgage was still in force..... p. 100

## No. 2414, Special.

KANDASS HUNRAJ, deceased, his Heir RUTEEBAEE, his Mother, by her Manager FAKEERCHUND, Appellant, *versus* DAMOTHURDASS, GOVURDUNDASS, Respondent.

Held that a deed of sale must be stamped; that a mortgage bond gives no absolute right in property; and that non-possession by an alleged mortgagee, unless specially provided for, is presumptive evidence against the truth of an alleged mortgage..... p. 104

## No. 2522, Special.

YEMOONABAEE, Wife of MEGUS SHAMROW SOMUNT, Appellant, *versus* UMROOTROW MYPUT SOMUNT, Respondent.

Held that by Hindu law the thing mortgaged must be something positive, and not uncertain and indefinite..... p. 106

## No. 2518, Special.

KISHUNDASS, *alias* KUCHERDASS, and RUGOONATH MARWADEE, Appellants, *versus* KESOO WULUD BAPOOJEE Patel, Respondent.

Held that by Hindu law no transfer of property, whether self-acquired or inherited, would be good, so long as debts were left unpaid..... p. 108

## No. 2420, Special.

JUGUNATH ANUND, Appellant, *versus* MAHADAJEE RAMCHUNDUR, Respondent.

Held in a claim to a share in a *gaonkee wutun* in the Rutnagherry Collectorate, that absence does not affect a proprietary title; and that as the claim was to recover the position of a *wutundar*, it was not interfered with by Section XIII. of Act XI. of 1843. p. 110

## No. 2388, Special.

MUTHOORADASS GORDHUNDASS, and DYABHAEE NURSEEDASS, Appellants, *versus* LALDASS NURHURDASS, ATMARAM BIKAREE, JUGUNATH DOOLUBH, HURJEEWUN JUGDESH, and UMBARAM MUKUNDASS, Respondents.

Nature of the engagement to be entered into under Section LXVII. of Regulation IV. of 1827, by a party desiring to stay a sale in execution of a decree..... p. 113

## No. 2551, Special.

JIWA BECHUR, Appellant, *versus* MOBUT NUTHOO, Respondent.

Possession is not necessary to the validity of a *sangir*o.....p. 117

## No. 2400, Special.

LUXMUNDASS SHUNKURDASS, and BAPOO SHASTREE BIN MAHADEO SHASTREE, Appellants, *versus* ROWJEE ABAJEE GORBOLEH, Respondent.

Held that in suits to raise attachments from property, the *onus probandi* should be on the defendant, to prove the title on which he caused the attachment and forced the opposite party to prosecute him, if the said opposite party is in possession, and claims to hold independently, and where no collusion between him and the owner is imputed.....p. 121

## No. 2413, Special.

SUJUNBHAEE WULUD RAHIMBHAEE, Appellant, *versus* GOVIND TRIMBUK, his Securities, LOBAJEE WULUD DURKOJEE, and JIJOJEE WULUD DAMAJEE, Respondents.

In a suit on a bond for which it had not been shown that full consideration had been given, it was held that the claim, to the extent admitted by the defendant, was not barred under Section IX. Regulation V. A. D. 1827.....p. 124

## No. 2446.

KUPOORCHUND HURUKCHUND, Appellant, *versus* DADABHOY RUTUNJEE, Respondent.

Responsibility by Hindu law for the debts of a deceased person of the parties who take his assets.....p. 126

## No. 2473, Special.

PURSHOTUMDASS MANIKLAL, Appellant, *versus* CHOTOOMUL MEHERCHUND, Respondent.

A, having obtained a decree against B, attached a debt due to him by C, whereupon D sought the removal of the attachment, on the grounds that he had undertaken, on the insolvency of B, to recover his outstandings, and settle his affairs, and that C was one of his debtors; but it was held that as A had not agreed to the arrangement, he was not bound by it.....p. 128

## No. 2448, Special.

RUNCHORE WULUBRAM, Appellant, *versus* KAESEERAM HURRYBHAEE, MUYESHWUR HURRYBHAEE, JAYBHAEE HURRYBHAEE, and HURRYBHAEE JOGESHWUR, Respondents.

Held in a suit for the possession of certain property, a part of which had already been adjudged to the plaintiff in another suit, that under Section XXV. of Regulation

IV. of 1827, the matter, as regarded so much of the claim, should not have been re-adjudicated.....p. 132

## No. 2474, Special.

ISHMALJEE WULUD MAMOODJEE, ESOOBJEE WULUD ULJEE, and HUSUNJEE WULUD ABDOOLJEE, Appellants, *versus* HOOSEINJEE WULUD ABDOOLJEE deceased, his Heir ESUBJEE WULUD ADUMJEE, HUSUNJEE WULUD IBRAMJEE, deceased, his Son and Heir MOOSHAJEE WULUD HUSUNJEE, ISHMALJEE WULUD AHMEDJEE, deceased, his Uncle and Heir MAMOODJEE WULUD DHONDJEE, MAHOMED ESOOB, deceased, his Son and Heir ULJEE WULUD MAHOMED, Respondents.

Held in a suit to establish a right to dance round the *ulawa* at the *mohurum*, which was decided in favour of the plaintiffs, agreeably to the usage of the country, that it is not the province of the Adawlut to decide a religious matter, and that the usage of the country takes precedence of religious law.....p. 139

## No. 2444, Special.

BAPOO WULUD MAHOMED ALI, Appellant, *versus* OOMERKHAN WULUD DAOODKHAN, Respondent.

A claim to *manpan* for the performance of certain ceremonies was rejected, on the grounds that it was optional to have the ceremonies performed, and that the plaintiff had not been called on to perform them.....p. 142

## No. 2215, Appeal.

GREGOR GRANT, Esquire, Collector of Land Revenue, Appellant, *versus* HUMABAEE, Widow of MERWANJEE HEERJEEBHOY, Respondent.

A claim to exemption from the payment of the *abkaree* tax on an estate in Bombay was rejected, on the grounds that such a tax was distinct from a tax on the land, and that exemption could not be claimed under the terms of the grant under which the estate was held.....p. 147

# SELECTED DECISIONS

OF THE

# SUDDER DEWANEE ADAWLUT, BOMBAY.

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No. 2376, Special.

VIRBUDRU HURRYBUDRU.....*Appellant*,

*versus*

BAEE RANEE, Wife of BALKRISHUN VENAEK, and her Sons RUTUNKRISHUN, GUNGAKRISHUN, and VEJUKRISHUN.....*Respondents*.

*Rupees* 50,000.

[Held in the case of a Hindu widow of the Nagur Brahmin caste, who had adopted a son, that it was not essential that she should have obtained the authority of her husband to make the adoption valid.]

1847
17th November.

This was a suit instituted by the next of kin of a deceased Hindu widow, to recover from her adopted son a half share of the jagheer village of Great Burachi, near Surat, and to set aside a certificate of heirship which had been granted to him.

The plaintiffs were Baee Ranee and her sons, who grounded their claim on their being next of kin to the deceased widow and her husband; and on the said

1847
17th November.

widow being without issue, and incompetent, by Hindu law, and the custom of the country, either to adopt a son without the sanction of her husband, or to divert the family ancestral property in any other way from the rightful heirs.

The defendant, Virbudru Hurrybudru, the adopted son of the deceased widow, pleaded that there were former decrees of Court which established his mother's right to the property, and that his own right, as derived from her, was indisputable: he also put in a genealogical table, which corresponded in all material respects with the one introduced below in the Zillah Judge's judgment.

The Principal Sudder Ameen of Surat, in whose Court the case was entered, after obtaining the opinion of the Shastree of the Surat Adawlut*—that the

* The question put to the Shastree, and his answer, were to the effect following:—

*Question.*

The founder of this family was Wamun Pathuk, the property left by whom, except Mota Burachi, was shared by his son, Sheobudru, with his nephew (brother's son) Vijbudru, when they separated and passed a phargut: they also divided the proceeds of the said village of Burachi. Hurrybudru adopted Poorunbudru, his brother-in-law, (wife's brother,) as heir to his share of the property, but some time after the death of Hurrybudru the said Poorunbudru gave up the jagheer, and, undergoing the requisite religious ceremonies, renewed his janwa, or sacred thread, and returned to his natural father's *kool*, or family. When Poorunbudru had done this, all the portion of the divided property bequeathed by Hurrybudru (who died in the interim) reverted to his widow, Rutunkoover, in virtue of decrees of Court. The said widow, to continue the *Woush*, or generation of her husband, adopted Virbudru, in the manner prescribed in the Shastr, and passed a writing, constituting him master of her property. Is this adoption legal, and, while such adopted son is living, have Baee Ranee, the daughter of Raveebudru, the son of Sheobudru, and her sons, a claim, the said Raveebudru being a

1847
17th November.

widow was perfectly competent to adopt a son—pronounced against the plaintiffs, whereupon they appealed to the Zillah Judge, who, on the case coming on for hearing, expressed his doubts of the correctness of the exposition of the Shastree, as it was so much at variance with what is said to be the law on the

relation of Hurrybudru, and living separately? If Virbudru's adoption be not considered sufficiently valid, should the paper passed to him by Baee Rutunkoover, making him master of her property, be upheld?

*Answer.*

Poorunbudru's withdrawal of himself from the *gotru* of the father who adopted him, and his return to his natural father's family, was opposed to the Shastr; if a son does not desire to inherit his father's property he is at liberty to decline doing so, but Poorunbudru, having been adopted as prescribed by the Shastr, and having been received into his family by adoption, he could not go back to his original family (Munoo, chapter ix. *dustuk* 142); but having obstinately done so, the portion of the divided property left to him by Hurrybudru reverted to Rutunkoover, who, in order to provide for the performance of her funeral rites, and to perpetuate the family of her husband, adopted Virbudru. It appears from the Dutuk Durpun and Dutuk Meemansa that he who has a son born to him should not adopt another, and on this principle it appears that he who adopted one son should not adopt a second; but in the case of a person not having a son born to him, adopting a son who afterwards forsakes him, it is not clearly laid down in the Dutuk Meemansa and Dutuk Durpun whether he can adopt again. If Rutunkoover adopted Virbudru as her second son, without the consent of her husband, but with the permission of her father, or, in his absence, with the permission of the members of her family, and according to the Shastr, even though Poorunbudru be alive, her doing so cannot be regarded as invalid, and consequently the daughter of Raveebudru and her sons can have no claim to the detriment of such adopted son; and, such being the case, there was no necessity for passing a writing to him, making him master of property which he would inherit as a matter of right. If a person desire to make over property left by his ancestors to any one other than his heir, he can do so with the consent of his kinsmen, as laid down in the Veer Mutroduya.

1847
17th November.

subject in Sutherland's Treatise on Adoption, Section XV. pages 4 and 108; Strange's Elements of Hindu Law, Section VII. page 66, Macnaghten, volume II. page 175, and also in Steele and Colebrooke. He also observed that no authority from Government for the adoption had been obtained, as required by the Shastr; that a decree in point was passed by the King in Council on the 6th January 1834; and that the Shastree of the Sudder Dewanee Adawlut in Calcutta had given his opinion that a widow cannot adopt. Under these circumstances he referred the question to the Shastrees of the Broach and Sholapoor Adawlut, and then gave judgment as follows:—

"The question at issue is one of Hindu law—whether a widow is authorized to adopt a son? The Shastree of this Adawlut gave it as his opinion that the adoption in this case was legal; but as that opinion appeared to the Judge to be not only at variance with Hindu law, but also at direct variance with other opinions given by the Shastree himself, the Judge viewed it with great suspicion. Upon carefully examining Macnaghten, Colebrooke, Strange, Steele, and Sutherland, the Judge could not find the slightest grounds in support of the Shastree's opinion, and the Shastree of the Sudder Dewanee Adawlut had already given it as his opinion that the widow could not adopt. Upon these conflicting opinions the Judge called for the opinion of the Broach Shastree, and also of the Broach Acting Shastree, both of whom have stated that the widow could adopt: the opinion of the Shastree of Sholapoor was then called for, and his exposition of the law is directly at variance with those of his brother Shastrees, but in accordance with those of Macnaghten, Cole-

1847
17th November.

brooke, Strange, Steele, and Sutherland, and with the opinion of the Shastree of Calcutta.

"It must be remarked that the adoption in this case is said to have taken place in Benares. Now, the adoption by widows under any circumstances is not acknowledged at Benares; and it must also be remarked that as this adoption affected jagheer land, it could not take place without the consent of Government, who are, of course, reversionary legatees: this point is distinctly laid down in the Shastrs, and the Government have frequently asserted the right, vide their letter dated the 28th October 1831, which it may be said is subsequent to the adoption now under consideration, but Government did not make this assertion of right without the fullest authority, and the right, therefore, does not date from the assertion, but the assertion from the right, which right is acknowledged in the Shastrs themselves.

"Again, the Shastrs say that the adoption shall take place with every publicity, and if the Judge mistakes not, at, or about, the place where the property is situated; but the adoption in this instance is said to have taken place at Benares, the property affected being near Surat.

"The Judge has carefully examined many authorities upon this point, and the following appears to him to be the law upon the subject, it being observed that every one of these points of law directly militate against the adoption in this case:—First, in Benares, adoption by widows is unknown. Second, adoption by widows in any part of India, without the consent of the husband, the husband's relatives, or at least the caste, is not recognized. Third, in cases of jagheer

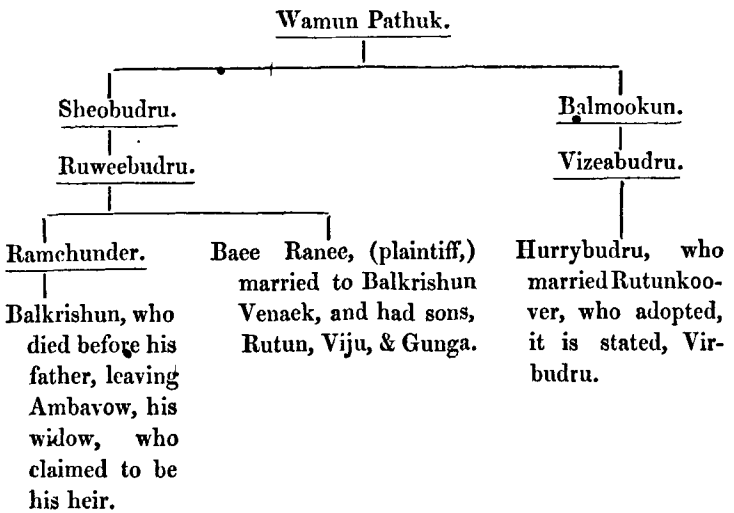
1847
17th November.

lands, the sanction of Government, as reversionary legatees, is imperative. Fourth, the adoption shall take place where the property affected is situated, so that all opposing parties shall have an opportunity of knowing and objecting to the same. This adoption was so clandestine that it may, or may not, have taken place at all.

"The conflicting opinions given by the Shastrees show clearly how absolutely necessary it is that something should be done to prevent the Courts and the people being left entirely at their mercy.

"The parties in this case have long been litigating, and it is a little curious and suspicious that a former Shastree of this Adawlut should have given an opinion which was afterwards negatived as utterly opposed to Hindu law. (Vide Selected Cases, page 132,* *in re* Ambavow *versus* Rutunkrishun, and two of the other plaintiffs in this case.)

"The following genealogical table embraces both cases:


Wamun Pathuk.
Sheobudru.
Balmookun.
Ruweebudru.
Vizeabudru.
Ramchunder.
Baee Ranee, (plaintiff,) married to Balkrishun Venaek, and had sons, Rutun, Viju, & Gunga.
Hurrybudru, who married Rutunkoover, who adopted, it is stated, Virbudru.
Balkrishun, who died before his father, leaving Ambavow, his widow, who claimed to be his heir.

* The Collection published in 1843.

1847
17th November.

"The Judge has had both these cases, which are somewhat connected, under his careful consideration, not with a view of canvassing the propriety of a decision passed by others, and confirmed by higher authority, but with a view of seeing whether Shastrees cannot, and do not, give opinions, upon the simplest questions, directly at variance with each other, and at variance with Hindu law. There appears no doubt that this case (Selected Case No. 32) was correctly decided, (vide Strange, volume II. page 242, *in re* Veerakah *versus* Venampratapa; also Steele, pages 176 and 177,) but in this case the Shastree gave a directly contrary opinion.

"After a careful consideration of all the facts of this case, as above detailed, the Judge is of opinion that the decree of the lower Court is utterly opposed to Hindu law, and determines to reverse the same, placing all costs upon defendant. The village to be made over to plaintiffs, as demanded in the suit."

After the passing of the Zillah Judge's judgment, the case went before the Sudder Dewanee Adawlut, on the application of the defendant, which was admitted, on the ground that the decision was inconsistent with law and usage; and it being considered that the opinion* of the

* The question put to the Shastree was: "Can a widow of the Nagur Brahmin caste adopt a son without having obtained the permission of her husband?" To which he replied: "If the husband forbade the adoption of a son, the widow could not adopt; but if he did not prohibit it, it must be understood that he assented to it. For it is commanded in the Shastr that a person who has no male issue must adopt a son, and if the widow adopted under such circumstances, in the way required by the Shastr, her act would be valid. Some law books deny this right to a widow, but the greater number allow it. To give publicity to the adoption, it should be made known to the ruler, though if this was not done the adoption would not be invalid if otherwise in accordance with the Shastr."

1847
17th November.

A. Bell, Esq.

Shastree of the Court, which was opposed to the view of the Sholapoor Shastree, and the authorities referred to by the Zillah Judge, afforded reasonable ground for questioning the correctness of those expositions regarding the point at issue, opposed as they appeared to be to the opinion of the four other Shastrees.

B. Hutt, Esq.

On the case then going before the sitting Judge, he recorded the following minute :—

"Having read such papers, and referred to such books as the parties desired, and having heard the arguments of the pleaders, the Court is of opinion that there is very strong ground for this appeal, although the Zillah Judge's view is also not without foundation. He has quoted several authorities, which appear in some measure to support him, and a decree of Her Majesty recorded in the case, to a certain extent, upholds the opinion that a woman requires the authority of her husband to adopt, and many instances are on record, showing that all Shastrees are not quite agreed on this point. It seems to be a matter that is involved in some obscurity, but the best opinion, and that which seems most generally to prevail, is that a woman, during her husband's lifetime, cannot adopt without his direction, yet that a woman may, if she act under the sanction of those who ought to guide her, and take a proper person to adopt. It seems even very doubtful, from some Bengal decisions very lately published, whether an adoption, if rightly performed, according to the rules laid down, can ever be set aside from any defect in the sanction, and the cases published by Mr. Borradaile most fully uphold the right of the widow to adopt without the sanction of her husband. The Court would then overrule the

1847
17th November.

objection of the Zillah Judge, and under Section XCIV. Clause 1st, Regulation IV. of 1827, return the papers, with directions to the Zillah Court to proceed to dispose of the case on its merits: this renders it necessary that it should be referred to a full Court, and it is referred accordingly."

Messrs. A. Bell, B. Hutt, P. W. LeGeyt.

Decision was then pronounced by a full Court to the effect that by the exposition of the Shastree of the Sudder Dewanee Adawlut, which was supported by decisions of the Court in other cases, the sanction of a deceased husband is not required as an essential authority for a widow to adopt a son, she being competent to do so without it; and under this view the decree of the Zillah Judge was annulled, and the case was remanded to be tried anew on its merits.

The case was accordingly taken up by the then Zillah Judge of Surat, who stated his opinion, in his decree of the 2nd June 1848, that the original suit had been tried by an incompetent tribunal, under the provisions of Clause 1st, Section XXXVII. of Regulation II. of 1827, the original defendants not being residents of the Zillah; and that the decree of the Principal Sudder Ameen, and the whole of the proceedings in the original suit, must be annulled as illegal. This being accordingly done, the case was remanded to the lower Court to be tried *de novo*, and a new decree passed on its merits, the Principal Sudder Ameen possessing then competent authority to entertain it, under Act XI. of 1844.

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NOTE.—Instead of awaiting a new trial, the defendant, Virbudru, presented a petition of summary appeal, which the Zillah Judge submitted to the Sudder Dewanee Adawlut, and in respect to which

the sitting Judge, Mr. P. W. LeGeyt, recorded the following minute, under date the 28th December 1848 :—

"On this case being called on, a difficulty presents itself to the Court as to how a case, decided in appeal by a Zillah Judge, can come before this Court in the shape of a second regular appeal, the provisions of Section I. of Act III. of 1843 appearing to limit appeals from decisions in regular appeals to special appeals.

"This case was forwarded by the Zillah Judge of Surat as a regular appeal, under a precept dated 19th September 1848; it was directed to be admitted on the file of this Court on the 2nd October 1848, by a Court of two Judges (Messrs. Hutt and Grant); it is called by the Zillah Judge a 'summary appeal,' and is also so entitled on this Court's file book. I am not aware of any Regulation authorizing the placing on the file any appeal save a regular and special appeal.

"The title 'summary appeal' does not occur in the Regulations, but in Chapter 22 of Regulation IV. of 1827, (which treats of special appeals,) provision is made in Clause 2nd, Section XCIX. for the receiving of a *special* appeal in a *summary* manner from any order passed in a judicial proceeding in an inferior Court, which, by not relating to the merits of the case in general, is not regularly open to correction by means of appealing against the decree. This I take to be the only summary appeal permitted; and, as such, it would not be entitled to be placed on the file, but be disposed of at once.

"Seeing, therefore, that Act III. of 1843 bars the admission of this suit as a second regular appeal from the decision of the Judge of Surat, dated 10th January 1848, and as the provisions of Clause 2, Section XCIX. of Regulation IV. of 1827 do not, in my opinion, admit of an appeal made under that Clause (and I take it that the Judge of Surat intended what he called a 'summary appeal' should be taken under the said Clause), being regularly filed and tried as a case, I hereby refer the following points to a full Court, to be determined under Clause 5, Section IX. of Regulation IV. of 1827, viz. whether the Case 2533 on the file of this Court can be tried as a regular appeal; and at the same time I record my opinion that it cannot be so tried, but can only be admitted as a special appeal, either under Act III. of 1843, or summarily under Clause 2nd, Section XCIX. of Regulation IV. of 1827."

On these points the full Court (present A. Bell, John Warden,

and P. W. LeGeyt,) decided 9th February 1849 that the petition was to be considered an application against an order preferred under Clause 2nd, Section XCIX. of Regulation IV. of 1827; and, viewing it as such, it was found that the order passed by the Zillah Judge was in conformity with the course open to him under Section XCI. of Regulation IV. of 1827. The application was rejected, with costs.

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## No. 2293, Special.

SHREERUNG LUKMINATH, by his Mooktiar
HURBAJEE WITUL .....*Appellant*,

*versus*

OOMERBHAEE, deceased, and KASUMBHAEE,
Sons of SADUKBHAEE.....*Respondents*.

*Rupees* 9,999.

[Held that a claim to a Wurshasun Allowance, brought eleven years after it was due, was barred under the Statute of Limitations, the plaintiff holding no written acknowledgment from the defendant.]

1848
28th November.

Shreerung Lukminath sued to recover Rupees 5,000 on account of a Wurshasun allowance due for 1830, payable from the revenues of the village of Batagaum, with interest at Rupees 4,999, making together the amount at which the claim was laid.

In the plaint, dated in 1841, it was set forth how the plaintiff had become entitled to the allowance, and how, on three former occasions, he had to enforce payment by suits at law; but for the defence it was contended by the brothers Oomerbhaee and Kasumbhaee that the plaintiff had no claim; that the sunud he produced was invalid, as it ran in the name of three persons as the grantors, and was only signed by

1848
28th November.

one; that as the claim was for 1830, and as the defendants' father did not come into possession of the village as mortgagee until 1835, they could not be held answerable for payment; and that the suit was irregular, in not having been laid at ten times the annual value of the allowance.

The Principal Sudder Ameen of Surat, who heard the case, held that the result of three former actions, in which the plaintiff had sought to enforce payment of the allowance, had established his right to it; and he accordingly passed a decree in his favour: but his decision was reversed in appeal by the Zillah Judge of Surat, who recorded the following judgment on the occasion:—

"It appears that the village in question belongs to Seetaram Rowjee, who gave a Wurshasun upon it, to the amount of Rupees 5,000, to the plaintiff Shreerung, subsequently to which the owner made over the village to Sadukbhaee, the father of the defendants, and hence the claim. It appears, also, by his own admission, that the plaintiff has obtained three decrees against the defendants for this Wurshasun, for 1829 against Seetaram Rowjee, and for 1835 and 1840 against the defendants' father. It is quite clear to the Court that the plaintiff, in having obtained decrees for 1835 and 1840, is now debarred from claiming for 1830, just in the same way that a receipt in 1840 is, in fact, a receipt for all debts up to that year, unless the receipt states otherwise. In the decrees not a word is said about a previous debt for 1830. The plaintiff has no written document whatever from the defendants, and the claim is therefore beyond the limitation of six years.

1848
28th November.

"The defendants say they only got possession of the village in 1834. The Principal Sudder Ameen decided in favour of the plaintiff on the grounds that there was no doubt he had a claim upon the village for Rupees 5,000. The Judge deems the decree objectionable: the only ground mentioned in it is, in the opinion of the Judge, the very ground that invalidates the claim,—that ground is, that a subsequent claim had been proved and admitted by the Sudder Dewanee Adawlut; but because the Sudder Adawlut gave a decree for a claim for 1840, it does not follow that it assented to a claim for 1830,—on the contrary, the subsequent claim destroys the supposition of the existence of any previous one.

"The Mooktiarnama produced by Hurbajee from Shreerung, (who is not now forthcoming it appears,) is upon a stamp of Rupees 4: the Mooktiarnama is a general power of attorney, and ought therefore by Regulation XVIII. of 1827, Section XII. to be on a stamp of Rupees 8. The plaintiff has produced no sunud to prove that he has a perpetual claim on the village: the Principal Sudder Ameen says that it is quite sufficient to prove that the plaintiff had a claim in 1830 of Rupees 5,000, because the Sudder Adawlut had decided that he had a claim in 1840. This is actually the sole reason assigned by the Principal Sudder Ameen for giving a decree in favour of the plaintiff,—the very reason that utterly invalidates the claim is the only one assigned for admitting it!"

H. Brown, Esq.

From this award of the Zillah Judge a special appeal was admitted in the Sudder Dewanee Adawlut, on the ground that, looking at the nature of the claim, the period of limitation should be twelve, and not six

1848
28th November.

G. Grant, Esq.

years; and the case having been called on for hearing, the sitting Judge recorded that it was his opinion that the nature of the claim brought it within the provisions of Section IV. of Regulation V. of 1827, where the period of limitation is twelve years; and that this view seemed to him to be quite in accordance with the opinion expressed by His Majesty in Privy Council in the case of Bunashunkur, on the 11th December 1837, wherein it was laid down that the debts pointed to by Section III. are confined to demands founded upon the contract of the parties, for the terms of which the Government of India justly thought it unsafe to rely upon the failing memory of witnesses beyond the period of six years, instead of *to grants made by the sovereign proprietor* of a territory. "It is urged for the defence," the sitting Judge proceeded to observe, "that under the interpretation on Section III. Regulation II. of 1827, which declares that claims for the recovery of arrears of rent or produce of land shall be subject to the same limitation as debts not supported by an acknowledgment in writing indicated in the said Section; but the interpretation is not, I think, applicable to this claim, which is not for arrears of rent, or the produce of land, but for a fixed annuity, payable under a sovereign grant. I would, under this view, refer the case to a full Court, with a view to the decree passed by the Zillah Judge being reversed, and the case remanded to be tried anew on its merits."

Messrs. A. Bell, W. Simson, B. Hutt.

The case accordingly went before a full Court, when the decree of the Zillah Judge was upheld, it being considered that he had taken the proper view, in respect to the period of limitation, in cases like the one under adjudication.

No. 2395, Special.

ABDOOBHAEE BAKURBHAEE, REMOOBHAEE HUSUNBHAEE, UKRUMBHAEE OOMUBHAEE, and UMEEJEE WULUBHAEE.....*Appellants,*

*versus*

UBJUL USRUF.....*Respondent.*

*Rupees* 99.

[A certificate of Special Appeal should be precise in stating the matter certified for inquiry.]

1849
23rd January.

This action was originally brought in the Court of the Moonsiff of Ahmedabad by Abdoobhaee Bakurbhaee, and the other appellants, to eject Ubjul Usruf from the office of Mootvulee of a Musjid, and to restrain him from disposing of a shop belonging to the said Musjid.

In the plaint it was set forth that the defendant had been appointed by public suffrage to the office in question, which gave him the management of the Musjid, but not the right to appropriate the property belonging to it to his own use and profit, the foundation having been established by public subscription, and from the profits of certain shops.

In the answer of the defendant it was contended that the plaintiffs did not belong to the méla, or assemblage of the people, who had appointed him Mootvulee; and that he had founded the Musjid himself, and had a right to collect its dues, and to sell and mortgage the shops belonging to it.

The Moonsiff held that sufficient cause had been shown for depriving the defendant of the office of

1849
23rd January.

manager, to which his right was limited, inasmuch as he had neglected to take proper care of the Musjid, and had exhibited a disposition to alienate its property, by offering some of it in mortgage. It was accordingly decreed that he should be ejected, and not allowed to interfere in the nomination of a new manager, nor with the management of the five shops belonging to the Musjid.

This decision, in appeal, was amended in the Court of the Principal Sudder Ameen of Ahmedabad, by the affirmation of so much of it as affected the defendant in his capacity of manager, from which office it was ordered that he should be dismissed; but in respect to the property of the Musjid, the Moonsiff's decision was reversed, on the ground that the suit had not been entered on a stamp of adequate value, though liberty was left to the plaintiffs to file another suit to recover this property, if so disposed.

Further appeals were then entered by both parties in the Court of the Zillah Judge, who also reversed that part of the decision which ordered the dismissal of the defendant, for the reasons recorded in the following minute:—

"The pleas raise the question as to whom the ownership of the Mosque belongs. It is not denied that it is a religious edifice, nor that the property attached to it was appropriated as an endowment of this Mosque, of which the defendant is Mootvulee. He represents himself as holding that situation, and he has been recognized in that character in several decrees. The suit is to remove him from office, in consequence of alleged malpractice. This consists simply of his having offered to mortgage a shop

1849
23rd January.

belonging to the Mosque to one Sarabhaee, in consequence of which a complaint was preferred against him to the Kazee, who deposed him from office, and the certificate of his dismissal is recorded. Following this act, and after the expiration of several months, this action was brought to consummate his deprivation by obtaining a judicial decree against him. The principal evidence is that of the Kazee, which, not being very clear or explicit, the present holder of the office was summoned and examined, and he has quite failed to show that the defendant was even formally deposed from his office, though, according to the exposition of the law, as propounded by his predecessor, (the evidence in the original suit,) such a preliminary is necessary. The deprivation of the defendant was, this officer deposes, entirely verbal, neither the complaint nor the defence, nor even the sentence, being reduced to writing, and the certificate, granted at the instance of the original plaintiffs, many months afterwards, to enable them to file it in the appeal, was written out from memory, and the Court has to trust, as the witness states, entirely to the Kazee for the truth of all this. All these crude proceedings related to an office which, if not hereditary, is generally retained by a family, and had been held by the defendant for twenty or twenty-two years: this the Kazee admits, yet, strange to say, it is in accordance with the law, that is, if the Kazee be right. He, however, appears to know very little of the matter, and nothing whatever of the history of the Mosque, as to who was the predecessor in the office now held by the defendant.

"The Court considers the evidence of the Kazee must be excluded, and, from the part he has taken in

1849
23rd January.

the matter, that his recorded exposition of the law is not entitled to much respect; and, no ground whatever being shown to justify the removal of the defendant, so much of the decree passed by the Principal Sudder Ameen as affirms his dismissal is reversed. The original plaintiffs, not having brought their action on a stamp of sufficient value, was not entitled to a verdict in respect to the shop; and his appeal against this part of the decision, which negatives their claim on those grounds, is thrown out, the Court affirming the decree of the Principal Sudder Ameen on that point without prejudice to his instituting further proceedings, if so disposed. Costs of both appeals to be borne by the original plaintiffs."

W. Simson, Esq.

From this decision of the Zillah Judge a special appeal was admitted in the Sudder Dewanee Adawlut, on the grounds that where the manager of a Musjid abuses his trust, he may be ousted at the suit of any believer; and that the Zillah Judge was wrong in reversing the decree of the Principal Sudder Ameen, for the reason he set forth.

P.W. LeGeyt, Esq.

The special appeal, however, was rejected by the single Judge, who recorded his reasons as follows:—

"The Vakeel for the respondent (original defendant) has raised an objection to the further proceedings in this case, alleging that the matter, stated in the certificate to have been the grounds of the Zillah Judge's decision, were not, in fact, the recorded grounds. On referring to the decree of the Judge, it appears that the claim of Abdoobhaee, and others, was thrown out, because the Court considered that the evidence of the Kazee must be excluded; that from the part he had taken in the matter, his recorded

exposition of the law was not entitled to much respect; and that as no ground whatever had been shown to justify the removal of the defendant, so much of the decree of the Principal Sudder Ameen as affirmed his dismissal was reversed. From this it certainly appears that the certificate does not set forth the real grounds in which the Judge came to the decision; and that the matter certified for inquiry, as the grounds of the Zillah Judge's decision, does not appear on the record; and under these circumstances the special appeal is rejected, with costs on appellants.

1849
23rd January.

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No. 2389, Special.

DOWLUTRAM MUNCHARAM, deceased, his Heirs, PURTABHAEE, HURRAEE, and SUNTOOKRAEE, Sons of DOWLUTRAM, the latter a Minor. ..... *Appellants,*

*versus*

E. G. FAWCETT, Esq., Collector of Ahmedabad..... *Respondent.*

*Rupees* 50.

[A Magistrate having warned certain parties that their building was encroaching on public ground, they entered an action against him to remove his obstruction, but were nonsuited, as they had failed to establish their title, which it was presumed was their object, and it being held that the *onus probandi* rested on them.]

This was an action tried by the Assistant Judge of Ahmedabad, in which the sons of Dowlutram Muncharam were the plaintiffs, and represented that when they were adding an *ota*, or portico, to their house, they

1849
29th January.

1849
29th January.

were prevented by the defendant, the Collector of Ahmedabad. For the defence it was contended that they were encroaching on public ground; and it was also objected that the form of action ought to have been an appeal to superior authority against the defendant's act as Magistrate.

The Assistant Judge found that on the ground in dispute there were two terraces, one of which, composed of brick, existed at the time of trial, and that the other, which was constructed of clay, had been removed by the workmen employed in commencing the construction of the new building. He also found that the ground was beneath the eaves of the plaintiff's house, and that by the usage of the country such ground belonged to the householder; that the house had existed in its then state for four years at least; and that the brick terrace had been there beyond the memory of the persons residing in the neighbourhood. It was also his opinion that the intended addition to the building would occasion no obstruction to the public road, and that although the plaintiffs did not produce their deed of sale, yet as the persons from whom they bought the house deposed to the ground in dispute having been attached to it at the time they occupied it, there was sufficient evidence of their title, and on these grounds he decreed that the Collector's interference was unauthorized.

The Collector then appealed to the Zillah Judge, representing, as in the original suit, that the ground did not belong to the plaintiffs, and that he was not liable to a civil action; and the case having been tried, the decision of the Assistant Judge was reversed, for the reasons recorded in the following judgment:—

1849
29th January.

"The action was brought by the plaintiffs to obtain an injunction to stop an order issued by appellant (defendant) to prevent their erecting a building in front of their house. The defendant pleaded that the plaintiffs were encroaching on the public way, and further, that the action ought not to have been brought in the Civil Court at all, as the order in question was issued by him in his Magisterial capacity, and to upset it an appeal should have been lodged to authority of higher criminal resort. The Acting Assistant Judge, for reasons set forth, decided in favour of the plaintiffs: the Court, however, takes a very different view of the case. The plaintiffs stand on their right as owners of the land to erect this verandah, and it was for them, therefore, to establish their title to do so. It appears from the evidence that they purchased the house from one Mugun Oomeashunker, and that a deed was executed in their favour. The said Mugun and his sons are witnesses in the suit, and though deposing to the existence of a deed, profess not to recollect whether it contained any mention of a verandah or not. It is very well known that a deed contains a specification of all those particulars; an inner wall is described either as party or exclusive; the verandah, and the site it occupies, are also recorded, and the boundaries are marked by the names of the persons who dwell in the surrounding houses. True, the owner Mugun declares that the ground in dispute was attached to the house when he occupied it, but the Court cannot consent to accept this summary evidence when proof is adduced of the existence of the deed. Independent, however, of the withholding this document, there is good reason to infer that its pro-

1849
29th January.

duction was not calculated to aid the cause of the plaintiffs. It is in evidence that since the property came into his possession the building has been taken down, and the whole plan of it altered; that what before constituted the side of it is now one of the fronts; and whereas formerly the eaves abutted on the house of a neighbour, Anaprace Tarachund, they have been brought forward, and look into the street. Under these circumstances it is useless for the plaintiffs to contend that because the ground in question is beneath the eaves it belongs of right to them, since this evidence shows that there was a time, and that during the period of their proprietorship, when the ground was entirely uncovered. In regard to the custom of the country, that is a rule which has its exception, as was lately determined by this Court in another suit on the authority of the Cazee, who declared that if the appropriation of such land is attended with public inconvenience, it cannot be taken. The plaintiffs contend that no inconvenience would result from the building, and instance what is noticed in the decree below, that the verandahs of the neighbouring houses extend beyond the site he had proposed to occupy. The answer to this is that the evidence shows that the road bordering on it is very narrow and confined, so that two carts can hardly go abreast, and it is very certain that the removal of one verandah must be so much in favour of public convenience, of which the defendant, as a public officer, must be allowed to be a competent judge. Then, as to the remains of an old verandah on the same spot, which the Assistant Judge in visiting the premises satisfied himself existed, the Court would observe that nothing

1819
29th January.

is so common as for persons in plaintiff's position to make false foundations, and in a city like this, when every excavation is sure to expose ancient foundations, it would be extremely dangerous to admit such appearances as evidence of title.

"In reversing the Assistant Judge's decree, it may be proper to add, that the plea advanced by the defendant, of his not being amenable to a Civil Court, is bad and untenable, since Clause 7 of Section XIX. of Regulation XII. of 1827 clearly gives the party aggrieved a right to contest the matter in the Court, though the order brought into question by this action, having been issued by the defendant in his Magisterial capacity, he ought not to have been described as Collector of the Zillah."

J. Warden, Esq.

A further appeal was then entered in the Sudder Dewanee Adawlut, and the case having been called on before the sitting Judge, he gave judgment as follows:—

"In this case the Magistrate warns certain parties that their building is encroaching on public ground: they answer that the ground is their own. From that moment the case became a question of title, and, as such, beyond the cognizance of a Magistrate. The Collector is, however, sued by the parties alleged to be encroaching, with the sole object, it may be presumed, to establish their title, which the Judge, from whose decision this appeal is preferred, considered they had failed to do—1st, because the appellants did not produce their title-deed, to the existence of which witnesses depose; 2nd, because, after the building came into appellant's possession, they pulled it down, and, in re-building, altered the plan entirely. The

1849
29th January.

appellants now state that their deed of sale was carried away with all their other papers by public officers, but this very important circumstance, if true, the appellants could hardly have failed to state in the early stages of this suit. The *onus probandi* is clearly on them, and as they have failed to prove their title, the decree of the Zillah Judge must be upheld."

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No. 2377, Special.

SUDASEW BIKAJEE RANARE, by his Mooktiar VISHNOO GOVIND LIMAJEE .....*Appellant,*

*versus*

SORABJEE RUTUNJEE, Parsee.....*Respondent.*

*Rupees* 85-10-0.

[Held that a younger brother, as Agent or Manager, is competent to mortgage family property in the absence of his elder brother, and that even if a partition had taken place, he could still mortgage his brother's share.]

1849
26th January.

Sorabjee Rutunjee sought in this action the removal of an attachment, issued against three *rookas* of land, laying his claim at Rupees 85-10-0, the extent of his demand on a bond by which the said land had been pledged to him.

From the pleadings it appeared that a family inheritance of six *rookas* of land, held by two brothers named Jewajee and Vitojee, fell into the sole management of Vitojee, in consequence of the absence of Jewajee, who had gone to Bombay to reside, but who,

1849
29th January.

previous to his departure, had taken upon himself the liquidation of a debt due by an ancestor of his to one Sudasew Bikajee, to whom he assigned his portion of the land in security. Subsequently, the whole of the six *rookas* of land were pledged by Vitojee to Sorabjee Rutunjee, and, in course of time, they became the subject of litigation, and were attached on account of the debt to Sudasew Bikajee, and hence the present suit, in which it was represented by the plaintiff that the land was *miraseé*, and entered in the Government books in the name of Vitojee; but by the defendant it was pleaded that neither Vitojee nor the plaintiff had any right to it.

The case was heard by the Moonsiff of Chakun, who held that the three *rookas* of land in dispute were shown to have belonged to Jewajee, and after him to his heir Ranojee, without whose consent Vitojee was incompetent to dispose of it in mortgage, and he accordingly nonsuited the plaintiff, who thereupon appealed in the Court of the Assistant Judge, who reversed the Moonsiff's decision, on the grounds set forth in his minute, as follows:—

"The Court finds that when the case was first before the Court, the land was described by the Vukeels of the parties as *gutkoolee*:* it now appears to be *miras*.† The documents produced clearly show that of some land, called *Thulbund Putee* Nos. 200, 201, 202, 203, 204, including six *rookas*, were formerly held by Ranojee, Ramjee, and Apajee, and by Vitojee, but in the year *Shuké* 1762, A. D. 1840, they were

* Land which no one can claim under a proprietory or hereditary right.

† The tenure of land-ownership in the Deccan.

1849
29th January.

all made over to Vitojee. Of this land the plaintiff claims three *rookas*, but cannot show that it was ever possessed by him, or by the person of whom he holds the mortgage. The defendant's mortgage, on the other hand, is backed by possession, and the Court considers there is sufficient proof of the power of Vitojee to grant the mortgage, and, at any rate, if he had no such power, the original holders of the land are the parties to complain. The Court, therefore, directs the raising of the attachment from the land, or from such parts of it as may have been attached."

The original Plaintiff then made a further appeal to the Zillah Judge, who delivered the following judgment in the case, in confirming the Assistant Judge's decision :—

"Two brothers, Vitojee and Jewajee, are acknowledged by both parties to be owners—share and share alike—of six *rookas* of land. Jewajee's share was in his possession till *Shuké* 1762, A. D. 1840. In the previous year he passed a note to appellant (defendant) to pay him Rupees 35 per annum, and in default that his three *rookas* were mortgaged to him : in this transaction the most essential condition of a mortgage, viz. placing the mortgagee in possession, was not fulfilled, and the instrument is not, therefore, a deed of mortgage at all. In *Shuké* 1763, *Fuslee* 1249, A. D. 1841, Vitojee is found in possession of both his own and brother's share, and mortgaged them in that year to the plaintiff. In *Shuké* 1764, A. D. 1842, Sudasew Bikajee, the original defendant, obtained a decree against Jewajee to fulfil the conditions of the promissory note already described, and attached the land in execution of it. The plaintiff prosecuted him to remove

1849
29th January.

the attachment. The point is, whether it should be removed or not? The Court is clearly of opinion that it should be removed: Vitojee is not bound to surrender his brother's land to any one who does not show a valid title to it. It has been shown that the defendant's deed gives him no hold on the land, and all that he is entitled to from Jewajee is the amount of his pecuniary claim. Vitojee must, indeed, render an account to his brother, against whom, however, he may possibly have a counter claim for expenses during the time the land has been in his possession, and which he says, in fact, he has, and which would be adjusted before the surrender of the land; this counter claim could not be preferred against the original defendant —a fact that affords the strongest argument in favour of the Court's opinion that it should not be surrendered to him. The appeal is rejected, with costs."

Dissatisfied, the original defendant presented a petition of special appeal in the Sudder Dewanee Adawlut, which having been called on for hearing before the sitting Judge, the following review of the case was taken:— B. Hutt, Esq.

"The petitioner puts forth several pleas, in which he urges the admission of a special appeal, especially that the two brothers had separate shares, and it was not lawful, therefore, for Vitul, the younger brother, to transfer his share to any one without his consent. It appears that one Ranoo had two sons, Jewajee and Vitul: the petitioner Sudasew appears to have lent money to one Hurry Dhungur, as long ago as *Shuké* 1720, A. D. 1798. Ranoo was Hurry's heir, and Jewajee, the eldest son of Ranoo, entered into an engagement to discharge the debt, pledging his share

1849
29th January.

of the land, which is said to be *mirasee*, to Sudasew as security for payment: this was prior to *Shuké* 1762, when Jewajee left the village and went to reside in Bombay, the land falling into Vitoo's hands, and in *Shuké* 1763 Vitoo pledged the whole to Sorabjee Rutunjee, who, on Sudasew's enforcing the execution of the decree he holds on this bond of Jewajee's, entered a suit to remove the attachment. The Moonsiff nonsuited the plaintiff, on the ground that Vitoo had no power to mortgage the land in the lifetime of his father without his consent: the Assistant Judge and Zillah Judge reversed the decree of the Moonsiff, principally on the ground that Sudasew did not hold the land in mortgage, and that as Vitoo held possession of the whole at the time he entered into the mortgage bond to Sorabjee, he had an undoubted right to do so. It appears to the sitting Judge the correctness of the view taken of this by the Zillah Judge is very questionable, and it is hereby certified that the special appeal is admitted on the consideration that a younger brother could not alienate any portion of the property of his elder brother which might, by his temporary absence, fall into his hands."

P. W. LeGeyt, Esq.

The case then came on before the single Judge, who delivered judgment as follows:—

"The Court is of opinion that Vitojee was in the position of manager of the family property at the time he mortgaged the ground, and was in possession, his elder brother being absent; and that it has not been proved, though asserted by appellant, that a partition of the property had taken place; and even if it were so, Vitojee might still have possessed the power to mortgage it, as the agent and representative of his

brother in his absence. If he possessed such power, either as manager or agent, no obstacle existed to the proceeding, and the Court, therefore, does not find that any cause has been shown to disturb the decree of the Zillah Judge. The special appeal is rejected, with costs on appellant."

1849
29th January.

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No. 2375, Special.

WUZEER MAHOMED PAYAR MAHOMED.... *Appellant,*

*versus*

WUZEERBOO, Daughter of NOOR MAHOMED..... *Respondent.*

*Rupees* 49.

[Held in the case of a Mahomedan mother, who had been divorced from her husband, and who was not shown to be of bad character, that her claim to the guardianship of their daughter, up to the age of 9 years, was superior to that of the father.]

1849
30th January.

Wuzeerboo was the plaintiff in this suit, to assert her right to the possession and guardianship of her child, Noorbeebee, and Wuzeer Mahomed, her husband, from whom she had been divorced, was the defendant.

The representation of the plaintiff was to the effect that she was married to the defendant, and had a daughter by him, named Noorbeebee, who was then four years old; that in Hejeira 1261, as she and her husband could not agree, they went to the Kazee and got divorced; that after this Wuzeer Mahomed sent a cart and took away Noorbeebee, but never sent her back, though she, the plaintiff, had several times sent for her; and that, according to Mahomedan law, she

1849
30th January.

was the girl's natural protector until she reached maturity, which was, moreover, provided for in a *phargutee* executed between her and Wuzeer Mahomed when they separated.

To this the defendant replied that it was merely provided in the deed of separation that Noorbeebee should only remain with the plaintiff so long as she was at the breast; that the girl was then five years old, and could eat and drink, and he was, therefore, her proper protector; and that the plaintiff was of loose character, for which reason he had obtained a divorce from her, and did not like that she should have the care of his child.

The case was tried in the Surat Zillah in the Court of the Sudder Ameen, who decided for the plaintiff, on the grounds that, according to the Mahomedan law, her title to be the guardian of the child was superior to that of the defendant, (who had not attempted to establish that she was of bad character,) it having been ascertained from the Molvee that the law on the point was that the woman's claim as guardian up to the age of nine years was valid. It was also ascertained that the word *rudayut*, signifying milk-period, was entered by mistake in the *phargutee* instead of *hyanat*, signifying minority, or under guardianship.

From this decision of the Sudder Ameen an appeal was entered in the Court of the Zillah Judge, who upheld it, observing that it was quite evident that as the period was passed when the *phargutee* was written, the insertion in it of the word *rudayut* must have been by mistake.

P. W. LeGeyt, Esq.

The admission of a special appeal in the Sudder Dewanee Adawlut was then prayed for, and granted

1849
30th January.

on the ground that as the original *phargutee* limited the term for the stay of the child with its mother to the period of suckling, and that as the *phargutee* was drawn up by competent authority, (the Kazee,) and was signed by the parties, and subsequently acted upon, it should not have been set aside.

A. Bell, Esq.

The case then went before the single Judge, who, after consulting the Kazee of the Sudder Dewanee Adawlut, decided that there was no reason to doubt the soundness of the decision come to by the lower Court, which was accordingly affirmed.

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No. 2411, Special.

PANDOORUNG BABOOROW.....*Appellant*,

*versus*

SUDGOOROW BIN BANGOOROW.....*Respondent*.

*Rupees* 25-9-1.

[By Hindu law, a son cannot sign for his father without the father's mark, or a written special power from him.]

1849
24th February.

Pandoorung Baboorow sued as village *Khote** in the Court of the Moonsiff of Sindiadroog, in the Zillah of the Konkun, to recover Rupees 34-14-8, as a balance due on some fields, and Rupees 47-4-0 due on a bond, laying his claim against several brothers, one of whom was Sudgoorow bin Bangoorow, who alone appeared to defend, and who pleaded that the

* An hereditary or temporary renter of a village in the Tanna and Rutnagherry Collectorates.

1849
24th February.

*Kuboolayuts** on which the claim to the balance of revenue was founded were forgeries, the amount having been already paid, to the constituted manager of the village; and, in respect to the other item, he alleged that it also had already been settled with the plaintiff himself.

The Moonsiff decided in favour of the plaintiff to the extent of Rupees 51-15-9, inclusive of interest; but in appeal his decision was amended by the Senior Assistant Judge at the detached Station of Rutnagherry, whose judgment was as follows:—

"It appears that the plaintiff in the original suit sued the defendant and five others for a balance of revenue due to him on account of certain *tikans*,† situated in Monjé Koombodeh, for 1840, which, with interest, amounted to Rupees 34-14-8; and also on account of a bond dated 15th August 1837, on which Rupees 47-4-0 was due, making a total of Rupees 82-2-8.

"None of the defendants in the original suit appeared to defend it, with the exception of Sudgoorow. With regard to the first item, the plaintiff produced two *Kuboolayuts*, marked No. 16 and 17, signed by Sudgoorow, in the name of his father: he now states that they are forgeries, and that the amount of balance of revenue for 1840 for the *tikans* he cultivated had been paid to one Luximon Deo Sawunt, the manager of the village, and for which he obtained his receipt. On examining the *Kuboolayuts* it appears that they are not forged documents, for the handwriting of Sudgoorow in the name of his father corresponds with his

* Agreement bonds.

† Fields or plats of ground of any kind.

1849
24th February.

signature to bond (No. 22), and to other documents in this suit, from which it is apparent that he did write his father's name to the document. Not having been signed, however, by his father, the Court was doubtful as to whether it could be considered a valid document; and it was, therefore, referred to the Hindu law officer whether it could be recognized as such or not, and in his reply he states that a son is not authorized to sign his father's name, unless he (the father) affixes his mark to it, or has passed a *Mooktiarputr*. The Court, therefore, cannot admit the validity of *Kuboolayut* No 16.

"With regard to the second item, Sudgoorow does not deny the execution of the bond (No. 22), but at the same time produces some receipts marked from Nos. 30 to 35, in order to show that the amount has been paid. The receipt No. 31 is the only one acknowledged by Pandoorung's *Mooktiar*, the other receipts do not bear any name or signature, and the Court therefore cannot place any reliance on them: the validity of the bond is also proved by the evidence marked 23, and by the admissions of Sudgoorow himself.

"Under these circumstances the Court deems it proper to disallow the first item claimed on account of the balance of revenue, but admits the second item on account of the bond. Costs to be borne by both parties in proportion."

W. Simson, Esq.

From this decision a special appeal was admitted in the Sudder Dewanee Adawlut, on the ground that the Senior Assistant Judge went counter to usage in requiring a *Mooktiarnama* from the father, and for want thereof, disallowing the son's signature to the father's mark.

1849
24th February.

P. W. LeGeyt, Esq.

The case then went before the sitting Judge, who gave the following judgment in the matter:—

"The Court is of opinion that the point to be decided is whether a son can legally sign a document for his father, to which the father's mark has not been affixed, without a power of attorney from the father to do so. It would appear from the Shastree's answer, recorded No. 13 in the appeal in the Senior Assistant Judge's Court, that in such a case a written power is necessary: No. 17 of the original suit bears what is alleged to be the mark of the father, but it was not admitted to be so by the opposite party, nor proved to be so by the appellant; and hence it appears that there is no document in the case which is proved to bear the father's mark. In the absence of such mark, the son cannot by Hindu law legally sign for his father without a special power. No such power is shown; and there appears therefore no cause to disturb the decree of the Assistant Judge. The special appeal is rejected, with costs on appellant."

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No. 2401, Special.

BUSUPA TURULGUTEE.....*Appellant*,

*versus*

GOWDSHANEE UNGDEE.....*Respondent*.

*Rupees* 192.

[Held that a security may be sued for payment of a debt, and that it is not obligatory to proceed first against the principal, or to proceed against the principal and security together.]

1849
9th February.

This was a claim to principal and interest, due on a note, instituted by Busupa, who represented that the

1849
9th February.

money for which the note was passed was lent to Gowdshanee Ungdee's brother, and that it was stipulated in the note that if he did not liquidate the debt by a specified date, the said Gowdshanee should be held responsible. For the defence, Gowdshanee contended that her brother had fraudulently passed the note, with the object of injuring her, he never having received consideration for the same.

The Court of First Instance held that the note was supported by the evidence, and that the claim was fully established; and, accordingly, passed a decree in favour of the plaintiff, which was affirmed in appeal by the Assistant Judge, who remarked in passing judgment:—

"The defendant grounds her objection on the person (for whom she became security) not having received consideration, but the Court considers her plea inadmissible, as the note was executed in 1839, and it is hardly likely that he would have allowed his bond to have remained in the plaintiff's possession so long had he not received consideration, and more particularly as his sister had become security for the amount, which it was clearly shown in evidence she had."

From the Assistant Judge's Court the defendant appealed to the Zillah Judge, who, in disposing of the case, stated his opinion that it was contrary to justice that a party taking a bond from another, and obtaining the security of a third person should, in the event of the bondee not paying, demand payment from the security, without taking any steps to recover the amount from the bondee. All reasonable efforts to recover from the bondee should fail, the Judge considered, before the security was called upon, or they

1849
9th February.

should both be sued together: and under this view the Assistant Judge's decree was reversed, with all costs on the plaintiff, who was left at liberty, however, still to sue on his note.

W. Simson, Esq.

A special appeal from this decision was admitted in the Sudder Dewanee Adawlut, on the ground that it was contrary to practice not to allow the suit to be brought singly against the security, and in requiring that the principal debtor should be included in it.

P.W.LeGeyt, Esq.

When this point wasargued before the single Judge, he recorded:—

"It appears that the respondent (defendant) was security for her brother, and in the bond (No. 17) in the original suit it is expressly stipulated that, if the debt was not paid on the 15th *Magh* following, she would pay it. The debt was not paid at due date, and I cannot, under such an express acknowledgment, hold that it was obligatory on the plaintiff to sue any other person than the defendant; and, under this view I cannot confirm the decree of the Zillah Judge. I accordingly refer the case to a full Court."

Messrs. A. Bell, John Warden, P. W. LeGeyt.

The case accordingly went before a full Court, when the objection raised by the Zillah Judge was overruled, and his decree being reversed, the case was remanded to be tried again on its merits.

No. 2393, Special.

BAPOO ROW SHOLAPOORKUR.....*Appellant,*

*versus*

RUMABAEE DESAEEN.....*Respondent.*

*Rupees* 1,343-2-0.

[Held that it is unnecessary to sue on a stamp that will cover the whole amount of an instalment bond, in seeking to recover such instalment or instalments as may be due thereon at the time of suing.]

1849
9th February.

Bapoo Row Sholapoorkur sued Rumabaee Désaeen in the Court of the Moonsiff of Chikodee, in the Dharwar Zillah, to recover a first instalment, due on a note of hand for Rupees 2,850, made payable by two instalments; the defence of Rumabaee being, that after delivering the acknowledgment to the plaintiff, he put off payment of the value of it from time to time, and at last would not give it. This, however, the Moonsiff considered she had been unable to substantiate, and he therefore decided the case against her, whereupon she appealed to the Zillah Judge, representing that her *karbaree* being in confinement at the time the suit was inquired into, she was unable to produce all the proofs she otherwise could have done to rebut the claim. The Zillah Judge gave judgment in the matter as follows:—

"The Court finds that the suit is laid to recover Rupees 1343-2-0, (upon a stamp that only covers that amount,) as the first instalment due upon a bond of Rupees 2,850. The Judge is of opinion that the suit has not been properly laid: the plaintiff, by bringing this action, will establish his claim to the

1849
9th February.

full amount of the bond, and consequently the stamped paper, upon which the claim is brought, should have been sufficient to cover that amount: the case is different when the suit is to recover subsequent instalments, as a stamp which would cover the full amount of these latter instalments would be sufficient; but in this case the Judge is of opinion the suit should have been brought on a stamp which would cover the full amount, not only now claimed as due, but which might hereafter be claimed were the bond established. The appeal is, therefore, under Clause 3rd, Section XVI. of Regulation XVIII. A. D. 1827, dismissed, the plaintiff bearing all costs. This decree, however, will not bar him from bringing another suit on stamped paper to the full amount."

W. Simson, Esq.

A special appeal from this decision was admitted in the Sudder Dewanee Adawlut, at the instance of Bapoo Row, on the ground, as stated in the certificate, of departure from usual practice on the part of the Zillah Judge, in dismissing the appeal from the decree of the Moonsiff, because the plaintiff had sued for an instalment only of a sum due on a bond, and not for the entire sum: the terms of the bond being that the money was to be repaid by instalments, and the sitting Judge being of opinion that it was competent to the plaintiff to sue as he did.

P. W. LeGeyt, Esq.

The case then went before a single Judge, who recorded that, as at the time the suit was instituted only one instalment was due, he could not agree in the Zillah Judge's reasoning, that because the authenticity of the bond would be proved by a decree in the plaintiff's favour, it was necessary to have a stamp for the full value of the bond, for he was not suing for

the bond—he had that by him; he was suing for a portion of what the bond secured to him, and to which only he was up to that time entitled. Under this view, the single Judge stated he could not confirm the Zillah Judge's decree, and he therefore referred the matter to a full Court.

1849
9th February.

The single Judge's opinion being concurred in by the full Court, on the same grounds: the decree of the Zillah Judge was cancelled, and the case was remanded to be tried in appeal in the Zillah Court on its merits.

Messrs. A. Bell, John Warden, P. W. LeGeyt.

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No. 2396, Special.

GUNPUTRAM ATMARAM.....*Appellant*,

*versus*

BAEEBHOWANEE, Widow of DUYASHUNKUR, LAKA JUYRAM, UMBAEEDASS BHUGWAN, and BHUGDA KULIAN.....*Respondents*.

*Rupees* 200.

[In a suit for the possession of some land, founded on a deed of gift, the plaint was dismissed by the Zillah Judge as irregular, in that the claim was not laid as prescribed in Section III. Regulation IV. of 1827, and because all the property mentioned in the deed was not included in it; but in the Sudder Dewanee Adawlut it was held that these objections were invalid.]

Possession of nine *bigas* of land, four of which were situated in the village of Buracha, and five in the village of Seeniara, in the Chourasee Purgunnah of the Surat Zillah, was sought by Gunputram Atmaram

1849
9th February.

1849
9th February.

in this suit, in virtue of a deed of gift executed in his favor by his maternal uncle, Kuroonashunkur. The claim was laid at Rupees 200 against Baee Bhowanee, widow of Duyashunkur, who was Kuroonashunkur's brother, and against three other individuals who rented the land; and for the defence it was pleaded that the brothers, Duyashunkur and Kuroonashunkur, had lived united; that Baee Bhowanee came into possession of the property as heiress-at-law, and that Kuroonashunkur was incompetent to execute the deed of gift produced by the plaintiff.

The Sudder Ameen of Surat, who tried the case, decided in favor of the plaintiff, being of opinion that the deed of gift was valid, and that the deceased, Kuroonashunkur, was competent to its execution; but his decision was reversed in appeal in the Court of the Zillah Judge, on the grounds that the original plaint was irregular, in that the claim in it was not laid as prescribed in Section III. Regulation IV. of 1827; and because "the plaint should have been laid for the full value of all the property specified in the deed of gift, as the validity or otherwise of a deed conveying so large an amount of property cannot be decided in a suit for a portion of it only, and it is evident that there is other property besides this land not in the plaintiff's possession."

The plaintiff then prayed the admission of a special appeal from this decision in the Court of the Sudder Dewanee Adawlut, which was allowed, it being considered that the dismissal of the plaint in the lower Court, for the reasons stated, was opposed to the practice of the Courts, the appellant alleging that he was in possession of the rest of the property; and it

A. Bell, Esq.

1849
9th February.

being also considered that under these circumstances the case should be remitted to the Zillah, to be tried on its merits.

On the certificate to this effect the case went before the single Judge, by whom it was stated in his record of it as follows :—"The points for decision in this case are stated to be, whether the grounds on which the Zillah Judge threw out the original claim are not contrary to the practice of the Courts? These grounds are two: 1st, because the original plaint was irregular, plaintiff not having laid his damages for the said land as prescribed in Section III. of Regulation IV. of 1827; and 2nd, that the plaint should have been laid for all the property specified in the deed of gift, as the validity or otherwise of a deed conveying so large an amount of property could not be decided in a suit for a portion of it only. The first of these points is waived by the respondent, and she admits that Rupees 200 is a fair valuation of the nine *bigas* sued for. In respect to the second point, I am not of opinion that it was not incumbent on the plaintiff to sue for the whole property specified in the deed of gift—he sued for a particular property, and produces this deed of gift to substantiate his claim: it might happen that he had resolved not to claim the other things specified, or he may have already obtained them, as he avers he has. I think the Zillah Judge has wrongly interpreted the law in every way on this point: if he considered the plaint written on a stamp below the real value, and saw no evidence of a fraudulent intention,—(and he has recorded none,)—he should have directed the party to make up the stamp,—but I am of opinion that this was not even necessary; and under this view I cannot

1849
9th February.

confirm the decree of the Zillah Judge, and refer the case to be tried by a full Court."

Messrs. A. Bell, John Warden, P. W. LeGeyt.

When the case went to the full Court, it was held that the objections taken by the Zillah Judge were invalid, and his decree was therefore annulled, and the case was remanded to be tried on its merits, the costs in the Sudder Dewanee Adawlut being ordered to be apportioned by the Zillah Judge on the final decision of the matter.

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No. 2403, Special.

SIDAPA WULUD HIRAPA, and SOMUNA WULUD YELAPA.....*Appellants,*

*versus*

SIDOO GOVIND KOOLKURNEE.....*Respondent.*

*Rupees* 14.

[Held that by the established usage of the country a *Mirasdar* cannot be deprived of his *miras* land in consequence of absence from it, however long.]

1849
9th February.

Sidapa and Somuna sought in this suit, which was entered in the Court of the Moonsiff of Sholapoor, to recover possession of 73 acres and 15 *goonté* of *mirasee* land, in the village of Koombaree. This land they represented was held by their father up to the time of his leaving the village in the great famine, when the village authorities gave it to another person to cultivate, and after him, in Fuslee 1240, (A. D. 1830,) it was given to Sidoo Govind, the defendant, who would not give it up.

1849
9th February.

In defending the suit, Sidoo Govind pleaded that the plaintiffs' family name was Naroté, and not Léndé, by which name the land in dispute was designated; that the land was not *mirasee*, but *guthoolee*, and had never been managed by their family; and that there were several other fields in Koombaree called Léndé, the surname of a family which had become extinct.

The Moonsiff decreed in favour of the plaintiffs, on the grounds that the evidence went to establish that the land had been in the management of their family as *mirasee*; and that a *mirasdar* does not forfeit his right to his land in consequence of absence from his village. He also considered that the defendant had failed to show that the land was *guthoolee*, and that the plaintiffs' family name was Naroté, whereas a *Surkaree dakla*, put in in evidence, proved that the land was *mirasee*, and had been held intermediately by one Kéroo, a relation of the plaintiffs.

This decision, in appeal, was reversed in the Court of the Zillah Judge, on the grounds that the land had never been managed by the plaintiffs, and that the member of their family, who had held it last as *mirasdar*, had deserted it, when his circumstances no longer enabled him to cultivate it; for which reason it would be unjust to take it from the defendant, (to whom it had been let in the interim,) after he had improved it. If the land was the plaintiffs' *mirasee*, the Judge went on to observe, they should not have abandoned it, and, if they wished to regain it as their *mirasee*, they should pay all the defendant's expenses, and compensate him otherwise; but the Court could not see sufficient cause to deprive him of the land he

1849
9th February.

had improved so much, and managed so long, on any other terms.

W. Simson, Esq.

From this latter decision a special appeal was admitted in the Sudder Dewanee Adawlut, "on a doubt as to whether the Judge had attended sufficiently to the custom of the country in his decree"; and the case having been called on before the single Judge,

P. W. LeGeyt, Esq.

he recorded:—"The Court below has thrown out the claim of the appellants, on the ground that they had absented themselves from the occupation of their land, (which it is not denied is held on the *miras* tenure) and that the subsequent tenant laid out money on it and improved it, and therefore should not be disturbed in his occupation. This, however, is quite at variance with the established usage of the country.—(Vide Chaplin's Report on the Deccan, para. 117, and also Case No. 2344, decided in the Sudder Dewanee Adawlut on the 22nd December last.) Under this view of the case, I cannot confirm the decree of the Zillah Judge, and refer the matter to a full Court."

Messrs. A. Bell, John Warden, P. W. LeGeyt.

The case went accordingly before a full Court, when the decree of the Zillah Judge was reversed, and that of the Moonsiff upheld, it being held that the grounds on which the claim had been rejected by the Zillah Judge were quite at variance with the established usage of the country.

No 2394, Special.

VEERPUKSHAPA PUTUNSHETEE.....*Appellant,*

*versus*

BUSWUNTAPA PUTUNSHETEE.....*Respondent.*

*Rupees* 40.

[Held that it was not against the practice of the Courts to reject a claim to a share in a *Wutun*, on the ground that the defendant, who claimed it as an adopted son, had been in possession four years; during all which time the plaintiff, who claimed equal right in it with the defendant, did not question his tenure, and could not show any reason for his supineness.]

1849
14th February.

There were three brothers—Malapa, Buswuntapa, and Veerapa—who held the *Shétee** *Wutun*† of Putun in severality; Veerpukshapa, the plaintiff, was the grandson of Malapa; and Buswuntapa, the defendant, the grandson of Buswuntapa the second brother; and the subject of dispute between them was the share of the third brother, Veerapa, whose issue failed in the second generation; the plaintiff claiming an equal portion of it with the defendant, but the latter claiming the whole, on the ground of his being the adopted son of Venkapa, the son of Veerapa.

The Sudder Ameen, who tried the case, decided it in favor of the plaintiff, as he found no proof of

* The *Shétee* is an hereditary officer of a village, town, or city, who has the superintendence and regulation of the traffic, in some places receiving *huks* from the ruyuts for measuring out the quantity of grain they have in the "*kulee*," or farm-yard. In some towns or cities there is a different *Shétee* for each class of traders.

† Literally one's native country, and hence the power and immunities possessed in one's native country; and from this it comes to signify all property or shares of hereditary right in land, or in the district establishments, and all hereditary property, whether in land or office—a patrimony.

1849
14th February.

the adoption of the defendant; but the Zillah Judge of Dharwar reversed the decision in appeal, being of opinion that although there was no proof of adoption, yet it had been established that the defendant had possession for four years, during all which time the plaintiff did not question his tenure, and could not show any reason why he did not do so. By this decision, however, the Zillah Judge did not decide upon the defendant's title.

A. Bell, Esq.

John Warden, Esq.

From the Zillah Court, a special appeal was admitted in the Sudder Dewanee Adawlut, the decree of the Zillah Judge being considered opposed to the practice of the Courts; but the single Judge, on the case going before him, recorded his opinion that there had been no departure from practice in the matter, and he accordingly affirmed the lower Court's decree.

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No. 2455, Special.

VITUL MULHAR PUNDIT, deceased; his Son and Heir RAOJEE, also deceased; his Sons and Heirs TATIA and TRIMBUK, Minors, by their Mother, who was also their Guardian, RADHABAEE, and by GUNESH VITUL.....*Appellants,*

*versus*

GUNGATHUR MULHAR PUNDIT.....*Respondent.*

*Rupees* 920.

[Held that the law requires that all the facts of a case must be assumed as stated in the decree, and that a special appeal cannot be admitted to correct an error in the determination of facts, even if the judgment appear inconsistent with, or contrary to, the evidence.]

1850
16th February.

In instituting this suit in the Court of the Moonsiff of Jooneir, Gungathur Mulhar Pundit (respondent),

1850
16th February.

made representation as follows:—Bapoojee Deo bin Dhurneedhur Deo gave my father, Mulhar Digambur, 120 *bigas* of land in *inam* in the village of Oozur, but as my father was old at the time, the *sunud* making the grant was executed in the name of his then only son, Vitul Mulhar Pundit: subsequently my father married a second wife, and had issue by her myself and my brother, Naro Mulhar, who died young. The *inam* remained in the possession of my father till his death, and then it went into the possession of my mother, who retained it till her death, which happened when I was a minor. When I became of age, I demanded a third share of the family property, but was refused by Vitul Mulhar Pundit; and I, therefore, lay this action against him at ten times the value of my share of the *inam* land, viz. 40 *bigas*, which I estimate at Rupees 2 a *biga;* and also at Rupees 100 for a house, and Rupees 20 for a piece of waste land. There is other property, which, being beyond the jurisdiction of the Court, I do not include in my plaint.

For the defence, Vitul Mulhar made answer:—The *inam* was not granted by Bapoojee Deo to my father, Mulhar Digambur, but to me: I could not agree with my father's second wife, and he gave me a house, and told me to go and provide for myself elsewhere; and I therefore went to Bapoojee Deo, who gave me a *chahoor* of land in *inam* under a *sunud*, and Baba Deo Ooturkur gave me a house of 5 *khuns*.

The Moonsiff decided the case in favor of the defendant, because the *sunud* was in his name, and had been proved to be a genuine document; but his decision was reversed in appeal by the Zillah Judge of Poona, on the grounds that it was specified in

1850
16th February.

the *sunud* that the *inam* was given to compensate the trouble and exertions of Mulhar Digambur Pundit in the service of Bapoojee Deo bin Dhurneedhur Deo; and that it was necessary that an *inam* so derived should be enjoyed by his sons, though of different mothers. The Judge further remarked—"The plaintiff has introduced a *turow-nama*,* to which the defendant's signature is attached, and in which mention is made that the *inam* should be divided into three shares: the defendant admits his signature to the document, and the Court considers, therefore, that if he had acquired this *inam* himself, he never would have allowed a document like this to have been executed, assigning away two-thirds of the *inam;* and the conclusion the Court arrives at is, that the plantiff's right to a share must be recognized." A third share of the property, as claimed, was accordingly awarded to him.

P. W. LeGeyt, Esq.

From this latter decision a special appeal was admitted in the Sudder Dewanee Adawlut, on the following grounds:—First, because the Zillah Judge appeared to have disregarded a certain document, filed No. 35 in the original suit, which was stated to have been executed by the mother of Gungadhur Mulhar Pundit during his minority, and Vitul Mulhar Pundit's, and by which the *inam* was settled on Vitul for certain considerations and concessions to the step-mother and her son. Secondly, because the agreement on which the Judge appeared to have relied, viz. No. 9 of the appeal, appeared to have been only a copy, and because the admission by the defendant of the signature thereto, as stated by the Judge, seemed

* A deed of settlement, or agreement.

to be a mistake, seeing that it was asserted that Vitul, at the date of the trial of the appeal, had been dead eight months. 1849 16th February.

The case then went before the sitting Judge, by whom it was dismissed, on the grounds that the law requires that all the facts of a case must be assumed as stated in the decree, and that a special appeal cannot be admitted to correct an error in the determination of facts, even if the judgment appears inconsistent with, or contrary to the evidence. A. Bell, Esq.

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No. 2378, Special.

HURRY RAMCHUNDER KANCH.....*Appellant,*

*versus*

TRIMBUK YESHWUNT KANCH.....*Respondent.*

*Rupees* 25.

[Held in a claim to a right of way over ground falling under the eaves of a building, which the plaintiff had sold, that as the right existed before the sale, and was not expressly conceded in the deed of sale, it must be presumed that it was reserved.]

This was a claim to a right of way, instituted by Trimbuk Yéshwunt, against Hurry Ramchunder, in the Court of the Moonsiff of Bassein, in the Zillah of the Konkun. The parties were members of a divided family, on the separation of which the family dwelling house was apportioned between the plaintiff and defendant, and a third member of the family, named Naro Bulal, by the award of a *Punchayut;* and the right of way claimed lay through a wicket at the back 1849 9th February.

1849
9th February.

of the premises, between a necessary belonging to all the members of the family in common, and a granary, his share, which the plaintiff had parted with to the defendant and the third sharer.

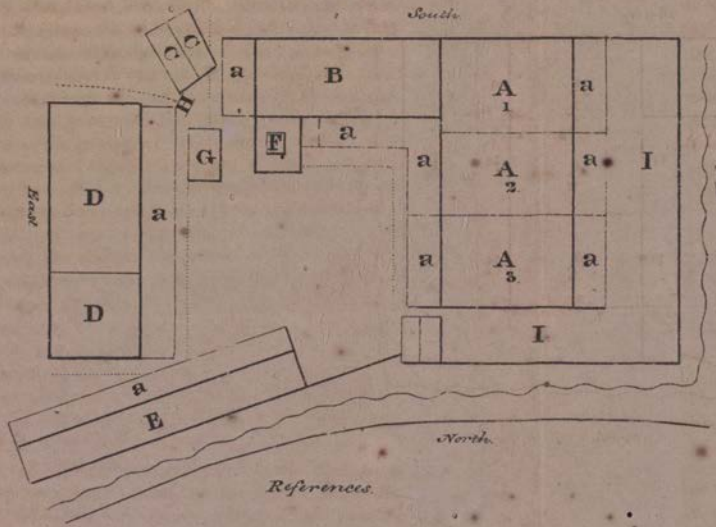
The Moonsiff decided the case in favour of the plaintiff, on the ground, principally, of the great hardship it would be to him to be deprived of the use of a back door, and holding, also, that by the terms of the *Punchayutnama*, and from the position of the wicket, a right of way through it was secured to him. The decision, however, was reversed in appeal in the Court of the Assistant Judge, who recorded the following judgment in the matter:—

"From the evidence adduced, little or nothing is to be made: even the persons who divided the property cannot say to whom the disputed door and land belong. The Moonsiff, therefore, having proceeded to the spot, had it measured in his presence, and, having done so, decided in the plaintiff's favour. In appeal, each party has produced plans (see opposite page) of the disputed property, and the two agree pretty well together. Having taken these, and all the other proofs recorded, into consideration, and heard the parties at length, the Court is of opinion that the decree of the Moonsiff is incorrect, and must be reversed. Both parties agree that the *luwadputr*,* No. 21, is a fair and true copy of the original: in the 5th paragraph of this it is ruled, that the land from the verandah of the house on the eastern side to the verandah of the *kotar* or granary on the western side thereof, and from the place where the rain water falls on the south to the same on the north, shall be divided

* Arbitration award.

# PLAN OF THE PREMISES.

*Shewing the site of the wicket through which the right of way is claimed.*




*References.*

**AAA** *The house.*
**B** *Wing of the house.*
**CC** *The necessary.*
**D** *The granary.*
**E** *A cow house.*
**F** *Place where the sacred Tooluo is planted.*
**G** *Small kitchen garden.*

**H** *Wicket through which the right of way is claimed.*
**II** *Yard.*
**aaaa** *Verandas.*
**1** *Trimbuk's division of the house.*
**2** *Hurry's* Dᵒ
**3** *Nare's* Dᵒ
*Space covered by the eaves of the house.*
*Public Road.*

1849
9th February.

into three equal shares; and each party, viz. the plaintiff, the defendant, and Naro Bulal, to take one. In the 6th paragraph it is laid down, that according to the above division, 16 *haths* of the *kotar* east and west, and 8 *haths* north and south, will fall within the plaintiff's share; but the whole of that *kotar* having been awarded to the plaintiff and Naro Bulal jointly, it is ruled, that in consideration of the said land, these two persons should pay the plaintiff Rupees 15. These two paragraphs are not quite reconcileable, owing to the *luwadputr* having been made by parties in Tanna who did not know the disputed property, which is situated at Bassein, because the division of the land in paragraph 5, being only to the foundation of the verandah of the *kotar* on the western side thereof, the ground under the *kotar* does not fall therein; but, be that as it may, the Court holds it quite clear that Rupees 15 were awarded the plaintiff in consideration of his renouncing all claim to any ground beyond that line above defined, and this view is supported by what is said by Rowjee Sudasew, No. 22, one of the *Punchayut.* Such being the case, the plaintiff's claim falls to the ground, as the disputed land is beyond that said line.

"The Moonsiff seems to have been influenced principally by a consideration of the inconvenience the plaintiff suffers, through not having a door opening to the eastward; but this the Court considers ought not now to be allowed any weight: the plaintiff should have urged it, and had it provided for, when the *Punchayut* was sitting. Again, he was influenced, also, by finding the ground under the *kotar* falling within plaintiff's share to be merely as specified in the award,

1849
9th February.

exclusive of the disputed spot; but it is quite evident to the Court, from other parts of the award, paragraph 2nd, *et cetera*, that the measurements specified were only approximations to correctness, and not intended to be taken as definite: hence this consideration, also, does not carry that weight with the Court it did with the Moonsiff. When the award was passed, there was only a small doorway at the spot in question, for the *halalcore* to water and cleanse the necessary, specially ruled to be joint property: the Court considers that the plaintiff had certainly no right to break down that and enlarge it, as he contends. For these reasons, the decree of the Moonsiff is reversed, with costs."

A further appeal in the case was then made in the Court of the Zillah Judge, who delivered the following judgment, in reversing the Assistant Judge's decree, and upholding the Moonsiff's :—

"This, and every decision in this suit, must be unintelligible without a reference to the plan. The chief reason of the Assistant Judge's decision against appellant is, that as he received from the other shareholders Rupees 15 in the 2nd, 5th, 6th, and 11th articles of the *Punchayutnama* in lieu of all right to his partial share of the *kotar*, and the verandah on the east side of the building, and ground, divided between the three parties into three separate shares, he therefore relinquished his entire right inside and outside of the *kotar*, in as far as regarded it; that by the notorious usage of the country, so much ground between the foundation and wall of the spot upon which the water from the eaves of a house falls outside, belongs to the proprietor of the house; that with reference to the plan, and to this *axiom*, as

1849
9th February.

applied to it, appellant cannot enlarge his wicket upon his own ground, and have ingress and egress therefrom, without infringing the rights of the respondent, by passing over at least a part of the ground within which the water must fall from a portion of the eaves of the *kotar*.

" It is admitted that before division the wicket and the right of way existed in common ; it is also admitted that the respondent, and the third sharer, Naro Bulal, have other back ways into their houses, from which appellant's, by division, is debarred; that the unoccupied ground within the building within which the wicket stands, is exclusively the property of the appellant, by the recent division of the *Punch*; that all the buildings standing on this third of the ground are also his, except a common right of occupying at particular seasons a small apartment, which has been reserved for the females of the three families, and the small angle of the *kotar*, and its verandah, the building, to reserve which entire, and thereby consult the common interests of the parties; has been the object in those stipulations of the *Punchayutnama*. This document provides for appellant giving up to the second respondent his right to this angle on payment of Rupees 15 to him by them, which stipulation is the basis of this dispute. It is also admitted, that if by this transfer appellant's right of a back doorway is barred, that he has only access to his premises through a single door; and it is evident that this, to a Hindoo of his class, would become an almost intolerable inconvenience. Now, in all disputes upon contracts of this nature, (contract by arbitration,) it is essential, on the score of equity, to endeavour to dis-

1849
9th February.

cover what were the intentions of the contracting parties at the time of the contract, as well as what advantages the strict and legal explanation of the instrument might convey to either party.

"In pursuance of this, the Court will consider, in the provisions of the *Punchayutnama*, which are applicable—

"1st, What were the intentions and understanding of the *Punchayut*?

"2nd, What was the understanding of the appellant when he consented, conformably to their recommendation, to give up his right to the angle of the *kotar* on receipt of Rupees 15?

"Of the last, it is scarcely necessary to observe, that it is quite self-evident appellant could never have contemplated engaging in so insane an agreement as, for a paltry sum of Rupees 15, received in lieu of his share in a building,—which share, if reserved, was actually of a far greater value,—to injure his remaining property, and entail upon himself and family great inconvenience and hardship, which his simple refusal to agree to the terms, and his demand to have his share of the *kotar* adjudged to him in preference, would have rendered unnecessary. For whose benefit, quite independently of the disputed right of way, were these provisions, which made over the whole *kotar* to the respondent and Naro Bulal, clearly intended? Why, to them unquestionably; since, though appellant would have been little benefitted by retaining his right to so small a portion of the end of the building as fell within his share, the division of the building by a separation wall would not only have entailed expense on all three parties, but have *materially*

1849
9th February.

*injured respondent's and Naro Bulal's property*, who shared between them the whole of the remainder. Such parts of the 2nd, 5th, 6th, and 11th paragraphs of the arbitrator's award, which refer to the subject, are as follows:—

"'*Para.* 2*nd*, *Clause* 3*rd*.—The southern half of the *kotar*, and of its adjoining *pudvee*,* to the west, is to belong henceforth exclusively to Hurree Ramchunder; but he and Naro Bulal are to pay to Trimbuk Yéshwunt Rupees 15, being the price of his share of the ground, situated to the south, *within the building of the said kotar*.'

"'*Para.* 5*th*.—Over and above the divisions of the house, the above-named three sharers are to divide equally among themselves the ground of their front yard, as well as that in the rear, situated between the *pudvee* attached to the house, and that of the *kotar* in length, and the eastern and western eaves in breadth: this division is to be made by exact lines; and each is to take and retain possession of such ground, whether occupied or *unoccupied by the buildings*, as may fall to his share within the aforesaid lines; and, moreover, he is to make such use of it, either of removing his own share in the building from it, or of erecting a new one thereon, provided he do not thereby injure the building of another sharer: no one is to obstruct, through his ground, the free passage of the water, both from the eaves and the drains of the others' buildings, but he is to allow it to take its course as heretofore.'

"'*Para.* 6*th*.—Sixteen cubits of ground from the east to the west, and eight from the north to the south, *within the building of the kotar*, have fallen to

* Verandah.

1849
9th February.

the share of Trimbuk Yéshwunt: owing, however, to the whole of this *kotar* having been made over by this award to Hurree Ramchunder and Naro Bulal, they are to pay to him Rupees 15; hence Trimbuk Yéshwunt can have no claim over the above ground.'

"'*Para.* 11*th*.—The entry under the head of deductions in favour of Trimbuk Yéshwunt is as follows:—A portion of the ground belonging to Trimbuk Yéshwunt being situated *within the building of the kotar*, cow-shed, &c., its price having been fixed at Rupees 15, one half of which is to be paid to him by Hurree Ramchunder, Rupees 7-8-0.'

"'*Ditto ditto*.—The remaining half to be paid to Trimbuk Yéshwunt by Naro Bulal, Rupees 7-8-0.'

"To the Court, the meaning of these paragraphs appears to be decisive, from the particular mention of the term *imarutiteel*, repeated carefully in each, on the condition of yielding his interest, in which alone the appellant was to receive Rupees 15. But this transaction is very different from a common sale, under the supposition of which the custom which has influenced the Assistant Judge in his decree can alone be appealed to.

"The disputed articles of the *Punch* were, notwithstanding, referred to the opinion of the Shastree of the Court. After an attentive consideration, his opinion as to the intentions of the *Punchayut*, and wording of the disputed clauses of their award, and also as to the equity of the question which has been raised by respondent, were conclusively in favour of the view before taken by the Acting Judge, who therefore reverses the decree of the lower Court, without exactly confirming the Moonsiff's decree, which the Assistant Judge had upset.

1849
9th February.

"This Court holds it established that the *imarut* of the *kotar* and verandah belong to the respondent, indeed, but that the appellant has a clear right to enlarge the wicket, with a sole and undivided right of way by it into his premises, through the ground outside of the wicket, between the angles of the *kotar* and the appellants' *Juzroo*, which ground was formerly a common path to the three parties, and which leads to the public road, is not adjudged to belong exclusively to him. The *Punchayut* have omitted to take any express notice of this trifling spot, though, according to the general terms of their decision, or in reference to the plan, it will be seen that it should belong to appellant. While, therefore, he has the right of way through this angle, he is not empowered to make any alteration which may affect the free passage of the rain from the eaves of the respondent's *kotar*."

A special appeal from this latter decision having been prayed for by the defendant in the Sudder Dewanee Adawlut, the *luwadputr*, and certain other documents in the case, were called for by precept from the lower Court, and on their receipt the following minute was recorded in admitting the appeal on the File:—

W. Simson, Esq.

"The sitting Judge is of opinion that in this case both parties are descended from a common stock, and have admitted the validity of a certain *yadee*, dividing the family property, on which *yadee* the plaintiff advanced his claim, but the Moonsiff in his decree set aside this document, arguing on gratuitous grounds for the plaintiff's right, which was, in fact, disposed of to the defendant by the plaintiff by that very *yadee*;

1849
9th February.

and the Judge afterwards maintained the Moonsiff's view against the judgment of the Assistant Judge, who adopted the *yadee*, and reversed the Moonsiff's decree. This Court, having called for and examined the *yadee*, finds that the right claimed (being a right of way) was made over for a money-consideration to defendant; and I am of opinion that the view taken by the Assistant Judge is right. The appeal is therefore admitted, on the ground that it is contrary to law and practice to set aside an express document admitted by both parties, and to dispose of such matters on gratuitous and assumed grounds—such as the convenience of one of the parties for instance."

John Warden, Esq.

In the consideration of the *luwadputr*, or award of the *Punchayut*, when the case went before the single Judge, it was found that by paragraph 6th of the document the plaintiff renounced his claim on that portion of a granary which, in dividing the house between him and his brethren, fell within his line of boundary. It was also observed: "The right of way now claimed by him is within the eaves of the granary, and, consequently, by established usage, is the property of the owner of the granary. In favor of this view of the intention of the arbitrators, is the evidence of one of them, Rowjee Sudasheo, and the circumstance that a breaking was necessary to form the way claimed. Against this view the Zillah Judge argues that the plaintiff could not have intended to cede for Rupees 15 that which was worth more; and that the relative position of the parties renders the transaction different from an ordinary sale; but a person is bound by his admitted voluntary act, and although the arbitrators, as stated, may never have

1849
9th February.

seen the house, the division of which they adjudged, they must have drawn up their award on the statements of the different members of the family; and there is nothing to show that the portion of the granary, that would have fallen to the plaintiff in the division, was really worth more than Rupees 15; neither does there appear to be anything peculiar in the transaction to change its character from an ordinary deed of division of a family house. The decree of the Assistant Judge, to uphold which this appeal is made, appears therefore equitable. Referred to a full Court."

Messrs. A. Bell, John Warden, P. W. LeGeyt.

The case then going before a full Court, it was held that the document, on the non-observance of which the special appeal was admitted, did not dispose of the precise point at issue, viz. whether the right of way under the eaves of the granary—the plaintiff's share of which was sold to the defendant—was also disposed of by the plaintiff; but that as this right of way to the plaintiff existed before the sale, and was not expressly conceded by him, it must be presumed that it was reserved by him. The appeal was therefore dismissed, with costs on the appellant.

No 2391, Special.

NAINSOOK ANUNDRAM, deceased, his Heir DHUMBAEE, *alias* PHOELBAEE, also deceased, her Heir SOOBARAM NAINSOOK, deceased, his Heirs SOOJANBAEE KOM ANUNDRAM, and ROOKMABAEE KOM SOOBARAM ..... *Appellants,*

*versus*

GIRAPA WULUD JAKAPA..... *Respondent.*

*Rupees* 977-2-7.

[Held, in a case in which only a part of the claim was awarded, and the whole of the costs were made to fall on the defendants, that it was competent so to do under the provisions of Clauses 2nd and 3rd of Section LVIII. of Regulation IV. of 1827.]

1849
14th February.

Girapa wulud Jakapa sought in this suit, in the Court of the Moonsiff of Sholapoor, to recover Rupees 2,000 as damages on account of the illegal seizure and sale of his shop, and to cover some expenses he had been put to in the matter.

He represented in his plaint as follows:—"I am not indebted to any one; neither have I been cast in any suit at law, and yet my shop, situated in Pét Mungulwar, of Kusba Sholapoor, has been seized and sold, under a pretence that one Ramchunder Dowlutram owed money to Nainsook, the defendant; and that Ramajee Naik Alundkur, who rented the shop from me, owed money to Ramchunder Dowlutram. I petitioned the Sudder Adawlut and the Judge of Poona against these proceedings, and it was decided that they were not in accordance with the Regulations; notwith-

1849
14th February.

standing which, I have not been able to recover possession of my shop. I therefore enter this suit, and claim Rupees 1,000 on account of the shop, Rupees 847-8-0 for loss occasioned by my not being able to follow my trade, and Rupees 152-8-0 for purchase of stamps in petitioning the judicial authorities, and paying Vukeels' fees."

To this the defendant made answer :—"If the plaintiff had a just claim to the shop, he should have filed a suit within the time allowed by the Regulations to stay the sale of it; but, as he failed to do so, the shop was sold by order of the Court, and the plaintiff has therefore no claim against me. The sale of the shop realized Rupees 300, and the plaintiff claims 2,000, which is incorrect."

The Moonsiff set forth in his decree in the case, that it had been shown that the plaintiff gave in a *kuthba*, in conformity with the Regulations, to postpone the sale; and that without awaiting the expiration of the time (30 days) allowed in the said *kuthba*, the defendant, presenting a *durkhast*, and furnishing security in the sum of Rupees 350, the estimated value of the shop, caused it to be sold, which it was held was contrary to Section LXVII. of Regulation IV. of 1827, and an interpretation of the Sudder Dewanee Adawlut, dated the 2nd June 1829, on Clauses 1st and 2nd of that Section; and, under these circumstances, it was decreed that the shop should be restored to the plaintiff, or the value of it, Rupees 350, given to him: Rupees 8 was also awarded to him on account of stamps, &c., but the rest of the claim was rejected.

Declining to accept this award, the plaintiff appealed to the Zillah Judge, representing, besides his former

1849
14th February.

grounds of action, that the defendants had been shown to have realized Rupees 336, in the shape of rent for the shop for 8 years and 5 months, at the rate of Rupees 40 a year; and that it had also been established that the shop was worth Rupees 1,000; and the case having been called on for hearing, it was decided to amend the Moonsiff's decree, by allowing the plaintiff Rupees 800 if the shop were not restored to him, that sum having been ascertained to be the value of it, and Rupees 13-8-0 on account of certain items of expense to which it was considered he was justly entitled; but the claim to damages on account of loss of rent was rejected, as the plaintiff had not filed a suit to recover it, and the claim to remuneration on account of loss sustained in trade was also disallowed, no proof having been adduced on the point. In respect to the costs, the whole were ordered to be borne by the defendants, on the score that if they had not illegally forced the sale of the shop, the plaintiff would not have had occasion to go to law, and incur the expenses he did.

Next a special appeal was prayed for by the defendants in the Sudder Dewanee Adawlut, which was
P. W. LeGeyt, Esq. admitted, on the ground that it appeared illegal to award costs incurred by claiming an amount exceeding the sum decreed, the plaintiff having sued for Rupees 2,000, and only getting a judgment for 813-8-0, and still being allowed the costs on the full sum. The
John Warden, Esq. single Judge, however, on the case having been called on, recorded his opinion that the Zillah Judge had been guided by the provisions of Clauses 2nd and 3rd of Section LVIII. of Regulation IV. of 1827; and that the case was such a one as is contemplated in those clauses. The decree of the lower Court was

therefore affirmed, and the appeal dismissed with costs on the appellants. 1850 14th February.

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No. 2404, Special.

DUNESHWUR DEOSHUNKUR.....*Appellant,*

*versus*

DEOSHUNKUR DOOLUBHRAM.....*Respondent.*

*Rupees* 500.

[Relative rights of descendants in the male and female lines, in respect to inheriting property according to Hindu law.]

Deoshunkur instituted this suit in the Court of the Moonsiff of Oolpar, in the Surat Zillah, against his cousins Dunéshwur Deoshunkur, and Wiswunath Deoshunkur, to recover possession of a house of two "*khuns*," or divisions, two *bigas* of land, and certain religious fees, designated *yujmanvritee*,* payable from 48 houses in the village of Arunja. 1849 16th February.

In his plaint he represented that this property was ancestral; that his father, Doolubh, and his father's cousin, Muyashunkur, lived separately, but enjoyed the property without dividing it; that when his father and Muyashunkur died, (the latter without issue,) he (plaintiff) became sole heir to the property, but, being under age at the time, he and his mother appointed one Bhaeeshunkur Sheoshunkur, the son of a female cousin, to conduct the business as *gomasta*;†

* The office and remuneration of a family priest.

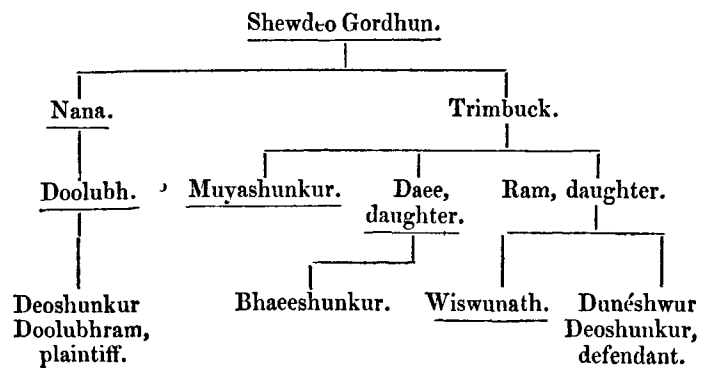
† An agent, deputy, factor, or correspondent.

1849
16th February.

and that on the death of this man, notwithstanding that his funeral expenses were defrayed by him, (plaintiff,) the defendants, who were Bhaeeshunkur's cousins, took possession of the property, without a shadow of title to it.

The defendant Wiswunath disclaimed any right to any property derived from Muyashunkur, and only asserted a title to a half share of such property as had been acquired and left by Bhaeeshunkur. The other defendant, Dunéshwur, denied the plaintiff's claim in toto; and pleaded that his brother Wiswunath was not sound in mind, and had been tampered with; he also contended that some of the property in dispute was his (Dunéshwur's) in his own right, and that to the rest he was entitled as the heir of Bhaeeshunkur, to whom it belonged. He further alleged, that by the rules of his caste, nephews inherit in preference to cousins, in the case of property left by uncles who die without issue; and that he had paid the funeral expenses of Bhaeeshunkur's widow.

The following genealogical table, reduced from one produced in evidence, will show the collateral relationship of the parties:—



1849
16th February.

The Moonsiff considered that it had not been satisfactorily proved that the plaintiff ever employed Bhaeeshunkur as *goomasta*, but that it had been shown that Muyashunkur inherited the property conformably to law; that a division of the property had taken place between Nana, the plaintiff's grandfather, and Nana's brother, Trimbuck, the father of the said Muyashunkur, plaintiff's cousin; and that the defendants, as the maternal nephews of Muyashunkur, were entitled to the share Muyashunkur inherited. He accordingly awarded one *khun*, or division, being half the house; one *biga* of land, and a moiety of the business, yielding the *yujmanvritee*, or 24 of the 48 houses of *yujman* to the plaintiff; and he also ordered that the plaintiff and the defendants should bear their own costs respectively.

Both parties appealed from this decision to the Zillah Judge, who recorded judgment as follows:—

"The Court, having reviewed this case, observes that the question at issue is, who is the heir of Muyashunkur—his father's brother's son, the plaintiff, or that brother's sister's sons, Wiswunath and Dunéshwur? From the petition of the plaintiff, it would appear that her father, Doolubh, and Muyashunkur, his first cousin, were, with the exception of their sisters, the only surviving heirs of their grandfather, Shewdeo Gordhune, no partition of the ancestral estate having taken place; that after their death the plaintiff succeeded to the whole property, and employed one Bhaeeshunkur, his cousin's son, to act for him as *goomasta*. The points objected to by the defendant in this statement are, first, that he, as Muyashunkur's sister's son, has a better right to Muyashunkur's share

1849
16th February.

of the property than plaintiff; and, second, that Bhaeeshunkur was not the *goomasta* of Deoshunkur, but was in fact Muyashunkur's heir.

Here the Zillah Judge introduced a geneological table of the family, which, being only an amplification of the one given above, is omitted, and he then proceeded: "An exposition of the Hindu law, given in this case, reduces the question to this—Did a division of the ancestral property take place between Nana and Trimbuck, or Doolubh and Muyashunkur, or not? To prove that it did, the defendant produces extracts from some *kurdas*, (village field registers,) in one of which Muyashunkur's name is entered, but Doolubh's name does not occur anywhere; the other *kurdas* are subsequent to his death, and the names of Bhaeeshunkur and the defendant are entered; but, from the evidence in the case, it would seem that Bhaeeshunkur was merely employed by the plaintiff as his *goomasta*, at the death of his father. This is also admitted by the defendant Wiswunath, who further disclaims any right to Muyashunkur's estate. The Court knows that when a division of property takes place, a memorandum of what fell to each is invariably given, and in fact that no division of property can be said to have taken place unless such document is given: this is always most religiously taken care of by the parties; but in this instance such document is not forthcoming, and as the defendant's claim rests upon the fact that a division of property did take place, they should prove it, but they have failed. Moreover, the Court remarks that the plaintiff has already received a certificate that he is Muyashunkur's heir: this certificate, having been given by the Assistant

1819
16th February.

Judge, is invalid, it is true; but, at the same time, defendant allowed judgment to be given in the matter, without raising the slightest objection at the time; this is an additional weight in the balance on the side of the plaintiff, whom the Court decrees to be sole heir to Muyashunkur; and, reversing the decree of the lower Court, decides that Muyashunkur's heir is Deoshunkur; and therefore orders the defendant to give him up the property sued for in the plaint, and not to interfere with his *yujmanvritee.*

From this decision of the Zillah Judge a special appeal was admitted in the Sudder Dewanee Adawlut, on the ground that it was opposed to the *Shastru;* and the case going before the single Judge, he pronounced the following judgment in it:—

W. Simson, Esq.

John Warden, Esq.

"Appellant pleads that the Zillah Judge's decree is opposed to the *Shastru,* in being founded on the principle that where a division of property takes place, an instrument stating the share of each sharer is invariably passed; and that, in fact, no division of property can be said to have taken place unless such document is passed. The respondent answers, that even if such a document exists, the real property and religious perquisites—the proprietary right in which forms the subject in dispute in this case—cannot descend to representatives of a female of a family; and that, failing a male heir, the alienated share reverts to the family to which it originally belonged; and, therefore, admitting the separation, on the proof of which the reversal of the Judge's decree is sought, his decree will still be in conformity to the *Shastru,* seeing that appellant is only allied to his family in right of his (appellant's) mother. If the statement of respondent be correct,

1849
16th February.

it will not be necessary to go into the evidence, which the appellant urges as sufficient, and the Judge considered insufficient proof of a separation, without a formal deed. Appellant objects to the manner in which respondent meets the appeal, as not being one of the modes in which he urged his original claim: but he claimed the property of his ancestors, which he said had never been alienated; and as the precise question that the Court has to decide is, whether the decree of the Judge is, or is not, 'opposed to the *Shastru*,' it appears to be bound to determine this very important point; and a question having been put to the *Shastree* of the Court, he says that the answer of the respondent has the sanction of the law. The decree of the Zillah Judge must, therefore, be deemed conformable to the *Shastru*, and it is accordingly affirmed, with costs on appellant.

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No. 2399, Special.

SUNTOO WULUD MADNAK, KRISHNA WULUD DEONAK, SUTWA WULUD RANNAK, GONNAK WULUD DHONDNAK, and CHANDNAK WULUD HUNAK.....*Appellants*,

*versus*

BABAJEE BIN SHRIPUTROW, VENKUTROW BIN JANROW, GUNOJEE BIN MATURJEE, and ROWJEE BIN RUVLOJEE.....*Respondents*.

*Rupees* 49-8-0.

[Held in a case instituted by some village *Mahars*, that they could not claim the skins of draught bullocks dying in the village, but must

make them over to the owners of such animals, receiving remuneration for their services in skinning them.]

1849
23rd March.

Suntoo, and two of the other appellants, brought this action to assert their right to the skins of all animals dying in the village, which right they stated Babajee and the other respondents had invaded, by employing the *Mangs** of the village to skin their dead bullocks, and appropriating the skins to their own use. The claim was laid at Rupees 49-8-0, being Rupees 37-8-0, or ten times the annual value of the privilege claimed, and Rupees 12, being the value of sixteen skins, alleged to have been taken by the defendants during four years.

The defence was in substance, that the *Mahar wutun* was enjoyed by five shareholders, all of whom should have joined in the suit; that by ancient usage, whenever a bullock died in the village, the *Mahars* took off the skin, and made it over to the owner of the animal, receiving remuneration in grain for their trouble, at the rate of five seers for a large bullock, and four for a small one; that these skins served the defendants for making materials required for their ploughs, &c., which materials were prepared by the *Mang* and *Chambar;* and that this was always the

* The *Mang* is one of the hereditary officers or servants of a village, termed *Balootédar,* among whom are also included the *Mahar* and *Chambar,* alluded to in this case. The business of the *Mang* is to make the leather ropes, thongs, whips, &c. required by the cultivators; the *Mahar* is the village watchman, messenger, and guide; and is, also, the guardian of the boundaries of the village, and assembles the *ruyuts* when their presence is necessary; the *Chambar* is the village currier, and worker in leather. As *Balootédars,* these servants are remunerated by certain fees in kind from the *ruyuts,* and have sometimes rent-free land, and many privileges.

1849
23rd March.

custom until the *Mahars* refused to give up the skins. The Moonsiff who tried the case held that the claim of the plaintiffs was established by the evidence, and by the showing of the defendants themselves, for, from their own account, it appeared, that instead of being entitled to the hides they laid claim to, they were in the habit of purchasing them; and he also held that if the defendants thought themselves entitled to have the hides returned to them, they should establish the right by an action at law, under which view he awarded payment of Rupees 1-8-0 to the plaintiffs, as the amount of loss they had sustained; and that the defendants should cease to interfere with the privilege.

In an appeal from this decision, in which the defendants included all the shareholders of the *Maharkée wutun*, the award was upset by the Assistant Judge, who recorded his opinion that the points for consideration in the case were—1st, whether the *Mahars* of the village were entitled to the skins of bullocks used for draught, or whether they belonged to the owners of such bullocks; and, 2nd, whether the defendants had interfered with any legal right which the plaintiffs had to the skins of all animals dying in the village. In regard to the former point, the Assistant Judge was of opinion that a document (No. 34) put in, induced the belief that the skins of draught bullocks, belonging to the Patels, were always restored to them on the death of the animals, the *Mahars* being paid a certain amount of grain for the trouble of skinning them—a custom which had been recognized in another village, as shown by a decree in another case:—"It was contended by the plaintiffs," the Assistant Judge observed, "that the *Mahars* were

1849
23rd March.

entitled to all the skins, and a decree of Court in another matter was produced to prove it, but in that case the exact point in dispute in the present case was not brought under consideration; it related merely to a dispute between the *Mahars* and *Mangs*, regarding their respective rights to the animals dying in a village."

On the first point, therefore, it was considered that the *Mahars* could not withhold the skins of draught bullocks belonging to the defendants, and the claim to damages was rejected; and, in regard to the second point, the Assistant Judge stated that he saw no proof that the defendants did more than obstruct the appropriation by the plaintiffs of the skins of dead draught bullocks. The injunction, therefore, prayed by the plaintiffs, was refused.

The original plaintiffs then appealed to the Zillah Judge, who, concurring with the Assistant Judge that the *Mahars* could not withhold the skins of the description of cattle alluded to, and that no invasion of rights had taken place, dismissed the appeal, with costs; whereupon the plaintiffs prayed the admission of a special appeal in the Sudder Dewanee Adawlut, which was admitted, on the ground that the decisions in the lower Courts, as affecting rights in respect to the skins of dead animals, were opposed to the usage of the country. But when the case came on for hearing, it was recorded:—"It appears that the special appellants in this case do not object to the right of the *wutundars* to receive back the skins of such of their dead bullocks as were used for draught: they urge that the disposal by the owners of the carcases of other animals not used for

A. Bell, Esq.

P. W. LeGeyt, Esq.

1849
23rd March.

draught is illegal, and contrary to usage; this allegation, however, was determined by the Assistant Judge (whose decree has been affirmed by the Zillah Judge) not to have been proved: it was also recorded—'the defendants do not appear to have prevented the plaintiffs from carrying away the skins of other animals.' There is, therefore, nothing for the Court to adjudicate, and consequently the special appeal is rejected, with costs on appellants."

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No. 2405, Special.

E. G. Fawcett, Esquire, Collector of Ahmedabad..... .....*Appellant*,

*versus*

Bapoo Pragjee.....*Respondent.*

*Rupees* 280.

[Held that the manner in which a Collector is to proceed in the resumption of land belonging to Government, found in the occupation of another party, is that which is prescribed in Chapter X. of Regulation XVII. A. D. 1827.]

1849
30th March.

Bapoo Pragjee instituted this suit in the Court of the Assistant Judge of Ahmedabad, for possession of a spot of ground, of the estimated value of Rupees 280, and to recover Rupees 20 as damages, on account of the destruction of a wall enclosing the said ground, laying his claim against the Collector of Ahmedabad, and the heirs of one Rugoo Prémjee.

In his plaint he stated thus:—Jétha Umbaram and Rugoo Prémjee obtained decrees in 1835 against a

1849
30th March.

person named Gungathur Kundérow, in satisfaction of which, property belonging to the said Gungathur, in the town of Dundooka, was attached and sold in 1840, and I was the purchaser, the said property consisting of two houses, and a *wada*, or compound, surrounded by a wall. This wall the Collector caused to be pulled down, and he took possession of the *wada*, whereby the value of the houses has been depreciated, and I have sustained great loss.

The Collector's answer was, that he claimed and took possession of the ground on the part of Government, as being within the old Fort of Dundooka, and therefore Government property, none of the land within the said Fort being private property; and with respect to the wall, he stated that it had not been destroyed by any order of Government. The other defendants pleaded that the plaintiff could have no claim against them, as the property, when it was sold under decrees of Court, was given over to him as the purchaser, and he passed them a receipt for it.

The Assistant Judge considered that it had not been proved that the wall was destroyed by order of Government; but in respect to the rest of the claim he recorded:—"The Collector, on the part of Government, claims the land, and says he has taken possession of it, as it is within the old Fort of Dundooka, and under his charge. After an attentive perusal and examination of all the exhibits in the case, and after having heard the arguments on both sides, it appears to the Court that this land, having been put into the possession of the plaintiff, as appears to be the case, the Collector should have filed a suit according to Regulation to dispossess him, and not to have taken

1849
30th March.

possession in the manner he did"; and, under this view, it was ordered that the disputed land should be given to the plaintiff, agreeably to the deed of sale to him, it being left to the Collector to file a suit to annul the sale if he wished: it was also ordered that costs on Rupees 280, the value of the land, should be borne by the Collector, and that those on Rupees 20, claimed as damages, should be borne by the plaintiff, who was also made to pay the whole of the costs of the other defendants, there being no cause whatever, it was considered, for his including them in the suit.

The Collector having appealed from this decision to the Zillah Judge, that Officer recorded his judgment in the matter as follows:—

"Respondent (plaintiff) was the purchaser of two houses, and the land they stood upon, which said property was sold by order of Court, at the instance of certain judgment creditors: the houses were previously in the possession of one Gungathur Kundérow, whose grandfather obtained permission of the Peishwa's local officers to build a house, and from that time, a period of nearly a century, it continued in his possession until the date of sale. Respondent (plaintiff) has no better title to adduce than this, but for every purpose he stands in the place of his predecessor. Appellant (defendant) is the Collector of the Zillah, and in that capacity has taken possession of the land by a most summary process, on the plea that it belongs to Government, and thereon opposes the title set up by respondent (plaintiff), and, as far as that may avail him, the plea is made out, for all the witnesses admit the land to be *Surkaree*, and the fact was not denied

1849
30th March.

by Gungathur himself, the former owner, when examined by the Collector.

"But for the purposes of this action, respondent (plaintiff) has, in the opinion of the Court, advanced a sufficient title: he has shown that he became legally possessed of the property by purchase, and that his predecessor occupied the land by permission of the local authorities, who, short of alienation, possessed the power to grant it. The question for the Court to determine is thus narrowed to the consideration of whether the Collector possesses a right to resume land in the manner here complained of: the Regulations in no one place, that the Court can discover, has armed the Revenue Authorities with the arbitrary power here assumed; and appellant (defendant) has failed to show that he acted in accordance therewith: his Counsel has directed the attention of the Court to Section VII. of Regulation XVII. of 1827, as giving the Collector power over all waste land, to dispose of it for the benefit of the revenue, but this is clearly inapplicable here, where possession has been disturbed; and it is not pleaded as the authority under which appellant (defendant) acted.

"From the whole tenor of the Regulations, it is manifest that the Collector can only proceed according to fixed rules, which, being made for the protection and security of the people, it is the duty of the Court to see upheld: take for instance Section XLVIII. of of Regulation XVII. of 1827, which enacts that whenever, in the course of inquiry, it appears that the holder of land, though not legally exempted, is, from uninterrupted enjoyment for a considerable period, entitled to indulgence, a compromise may be concluded:

1849
30th March.

here we have a prescriptive right extending over a hundred years. It cannot, therefore, be urged, as appellant (defendant) argues, that it was a matter of no importance to the plaintiff's demand whether the Collector's proceedings were regular, or the reverse,—according to the Court's view of the matter it was of great concern to him.

"Appellant (defendant) is clearly here a wrong doer: the Court decides nothing respecting the superior right of Government to this land; but it disputes the authority of its officer, the Collector, to resume it after this fashion: he has forms and rules of his own to observe, which must be acted up to; if he considers the Government title undeniable, he should assert it in such a manner that the Court may be enabled to uphold him in the exercise of his authority when called in question: in the mean time, the course of procedure here adopted cannot be sanctioned by the Court. Judgment affirmed, with costs."

P. W. LeGeyt, Esq.

A special appeal was next admitted in the Sudder Dewanee Adawlut, on the ground that as the right of Government was admitted, it seemed doubtful whether it was right to bar the legal owner from taking possession because it was not done by means of legal process; and the case going before the single Judge, he recorded the following minute on the subject:—

P. W. LeGeyt, Esq.

"In this case, the point for trial is whether the Collector of Ahmedabad, as the agent of the acknowledged owner of certain land, the Governor in Council, was justified in taking possession of it in a summary manner when it was in the occupation of another party, who considered he had a *bonâ fide* claim to it. The Zillah Judge admitted the proprietary right of Go-

1849
30th March.

vernment in the soil to be undoubted, but as occupation had been permitted to certain parties for many years by Government, and as the present respondent (plaintiff) derived from that party, he considered the landlord could not re-enter and take possession without a formal process. There does not appear to have been any actual physical opposition to such retaking possession by the Collector, and considering the position of the Collector, it is not likely that there would be any; neither does notice appear to have been served on the party to evacuate the ground previous to possession being taken of it by the Collector.

"The Collector, therefore, went in and exercised the rights of an owner,—this was protested against, and the present action was filed to eject him: the position of the respondent (plaintiff) appears to have been that of a 'tenant on sufferance.' I find on a reference to Phillipps on Evidence, Vol. II. p. 273, that a demand previous to an action for ejectment is not necessary to a tenant on sufferance, though it is to a tenant holding on any actual, or even implied agreement. The question, however, in this case, is, whether a landlord, without previous demand or notice to quit, may go whenever he pleases, and take possession of premises, the occupation of which he has permitted to another for many years. I think, if he met with any opposition, he could not do so; but in this case, it appears he did not, and quietly regained what was certainly his own. I am not prepared to go along with the Zillah Judge, and at once declare he could not do so; for, although I consider the course pursued arbitrary and rough, yet I am not satisfied any legal right was infringed by it. I therefore refer the case to be tried by a full Court."

1849
30th March.

Messrs. A. Bell, John Warden, P. W. LeGeyt.

It went accordingly to a full Court, when judgment was delivered as follows:—

"The Court is of opinion that the Government is the absolute proprietor of the soil of India, which, 'whether applied to agricultural or other purposes, is liable to the payment of land revenue according to established principles,' unless proved to be exempt, under any of the provisions for that purpose contained in Chapters IX. and X. of Regulation XVII. of 1827; and even the so exempted land is liable to assessment 'whenever and so long as the exigencies of the State may render such assessment necessary.' The Government of India, then, has at least all the rights which belong to landlords in Europe, and may, therefore, as they may, 'when a person who hath no right hath taken possession of land, make a formal but peaceable entry thereon, declaring that they thereby take possession'; but the Government of Bombay has made certain concessions in Regulation XVII. of 1827, defining the relative 'rights in the land of the Government and the subject,' which their Collectors are bound to carry out in the manner prescribed by the said Regulation, Chapters IX. and X. of which lay down the manner in which titles to exemption from the payment of land revenue are to be determined.

"The appellant, the Collector of Ahmedabad, founds his claim to having taken peaceable possession in this case, on Section VII. of the Regulation, which enacts that 'uncultivated land not exempted from assessment may be disposed of, with the Collector's sanction, for the benefit of the revenue;' but it is clear, from the existence of Chapters IX. and X. of the Regulation, that he is not permitted to determine the question of

1849
30th March.

the exemption, or otherwise, of such land, in any other way than those Chapters prescribe.

"If the appellant had shown that before taking possession he followed the course laid down in the two first Sections of Chapter X. no exception could be taken to his proceedings, and the respondent must have been told to seek his remedy as prescribed in Section XLIX. of the Regulation. The Court holds the Zillah Judge to have taken a perfectly correct view of the scope and object of the Regulation, and, accordingly, confirms his decision. Ordered, that costs be paid by appellant."

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No. 2408, Special.

RAMCHUNDUR ANUNT KOLUTKUR.....*Appellant*,

*versus*

RAMSALVEE BIN BHAMSALVEE.....*Respondent*.

*Rupees* 23-10-0.

[Instalments which may be overdue on a bond may be sued for separately.]

1849
30th March.

This suit was for the recovery of two instalments, with interest, due on a note of hand for Rupees 70-8-0; and of the batta of a peon sent to demand payment. It was instituted in the Court of the Sudder Ameen of Rutnagherry, in the Konkan Zillah, by Ramchunder Anunt Kolutkur, against Ramsalvee bin Bhamsalvee, who pleaded not indebted, and that the note of hand was a fabrication.

1849
30th March.

The Sudder Ameen decreed payment of the two instalments, with interest, in favour of the plaintiff, but his decision was annulled in appeal in the Court of the Senior Assistant Judge, at the detached Station of Rutnagherry, and the suit was ordered to be struck off the file, on the grounds that there would still be a balance against the defendant on account of the note of hand, and that it would not be fair, or consistent with justice, to allow a separate suit to be instituted for every instalment that might become due, or that judgment should be passed more than once on a single note of hand. If the plaintiff, it was held, had failed to fulfil his agreement, the whole amount of the note became due, and the plaintiff should have instituted his suit accordingly.

From this decision, a further appeal was entered in the Court of the Zillah Judge of the Konkan, but it was afterwards struck off the file of that Court, conformably to the interpretation of the 12th September 1846 on Act III. of 1843, and submitted to the Sudder

W. Simson, Esq.

Dewanee Adawlut, in which it was admitted as a special appeal, on the ground that the Senior Assistant Judge "had departed from the practice of the Courts, in requiring that the suit should have been brought for the full amount of the note of hand, which was payable by instalments, of which two were due at the time, and which were sought to be recovered."

P.W. LeGeyt, Esq.

The case then went before the single Judge, who recorded the following minute:—

"The point for decision is, whether the Senior Assistant Judge decided rightly in throwing out the suit because two instalments only of a bond were sued for, and not the whole amount of it. There have

1849
30th March.

been some decisions on this point lately by this Court, in which a contrary principle was maintained. In the present case, it appears that the two instalments sued for was all that had become due at the date of the filing of the suit, and it does not appear to me that the whole agreement was necessarily null and void, because of the delay in payment of those instalments; or, if it were so by the terms of the bond, that the plaintiff was not restricted from suing for the specific portions which were overdue. Under this view, I cannot confirm the Senior Assistant Judge's decree, and refer the case to be tried by a full Court."

The full Court took the same view of the matter, and reversed the decree of the Senior Assistant Judge, remitting the case back to the Zillah to be tried again on its merits, and ordering the costs to be apportioned in pronouncing a new decision.

Messrs. A. Bell, John Warden, P. W. LeGeyt.

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No. 2374, Special.

JAHANGHEERBHAEE MUNCHURSHAH.....*Appellant,*

*versus*

NUSURWANJEE MUNCHERJEE.....*Respondent.*

*Rupees* 798-4-1.

[Held in a claim under a mortgage deed, the date of which was beyond the period of limitation, to recover interest provided for by an endorsement on the deed, whose date was within the period, that the endorsement was not such an admission of the justice of the demand (contemplated in Clause 1st, Section VII. Regulation V. of 1827) as would allow of the transaction being reckoned from the date of it.]

1849
30th March.

Nusurwanjee Muncherjee sought to recover Rupees 2,525, as interest due on a mortgage deed executed

1849
30th March.

by 'Jahangheerbhaee Munchershah's father; the said Jahangheerbhaee Munchurshah, against whom the suit was entered, contending that the deed contained internal evidence of the dishonesty of the claim; that an endorsement on the back of the deed, providing for the payment of interest, so altered the nature of the instrument, that an action thereon was altogether untenable; and that the claim was barred under the Statute of Limitations: he also pleaded total ignorance of the transaction.

The case was tried by the City Moonsiff of Surat, who rejected the claim, on the ground that the endorsement (dated in 1834) changed the nature of the deed (dated in 1824) in such a way that an action on the latter could not be maintained; but in appeal, the Zillah Judge of Surat held that the claim to interest was good, agreeably to the terms of the deed, which had been declared to be a valid document in another suit: with reference, however, to Section XII. of Regulation V. of 1827, the amount was limited to Rupees 798-4-1, including interest from the date of filing the suit.

W. Simson, Esq.

A special appeal from this decision was admitted in the Sudder Dewanee Adawlut, on the ground that, looking at the deed itself, the claim would seem to be barred by the Law of Limitations, though the date of the endorsement would bring it within the time: there was a doubt, however, it was noticed in the certificate of admission, whether a new endorsement, duly witnessed on an old deed, brought such deed within the time specified in the Regulation, which was the point to be tried.

1849
30th March.

When the case came on for hearing, the respondent (plaintiff) gave in a *durkhast*, pointing out the applicability of case No. 53 of Borradaile's Reports; but this the single Judge stated he did not see, and he also recorded that the Judge who granted the certificate admitting the special appeal was in error in supposing that the endorsement on the deed was duly witnessed. It was his own opinion, that it was the deed, and not the endorsement, which must be looked to, and that the claim was therefore barred by the Law of Limitations, and under this view he referred the matter to a full Court, in order that the decision of the lower Court might be reversed.

Messrs. A. Bell, John Warden, P. W. LeGeyt.

The full Court concurred that it was the deed that must be looked to, the endorsement not being such an admission of the justice of the demand (contemplated in Clause 1st, Section VII. Regulation V. A. D. 1827) as would allow of the transaction being reckoned from the date of the admission; and the decree of the Zillah Judge was accordingly reversed, with costs on respondent, original plaintiff.

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No. 2407, Special.

KRUSTNABAEE KOM KUNDOO DADAJEE..*Appellant*,

*versus*

RAMCHUNDUR BHUGWUNT.....*Respondent*.

*Rupees* 397-7-6.

[Held in a claim founded on an instalment bond, the date of which was beyond the period of limitation, that the instalments falling due within the period were recoverable.]

1849
30th March.

This was a suit instituted by Krustnabaee, in the Court of the Moonsiff of Nassick, in the Ahmednuggur Zillah, to recover on an instalment bond as follows:—

| | | | | |
|---|---|---|---|---|
| Amount of the bond (payable by annual instalments of Rupees 25) in Jureeputka Currency..... | Rs. | 425 | 0 | 0 |
| Deduct— | | | | |
| Amount of six instalments irrecoverable under the Law of Limitations..... | | 150 | 0 | 0 |
| | | 275 | 0 | 0 |
| Add— | | | | |
| Interest on remaining nineteen instalments. | | 230 | 10 | 0 |
| | | 505 | 10 | 0 |
| Deduct— | | | | |
| Exchange..... | | 33 | 6 | 0 |
| | Company's Rupees.. | 472 | 4 | 0 |

In the bond it was provided that if the amount of it were not paid agreeably to the terms specified, the defendant Ramchundur Bhugwunt was to make over to the plaintiff 20 *bigas* of land, to be possessed by her for ever; and for the defence, the said Ramchundur Bhugwunt, without denying the claim, but suggesting that it was barred by the Regulation of Limitations, stated his readiness to abide by the condition of forfeiting the 20 *bigas* of land.

The Moonsiff, reckoning from the date when the last instalment was due on the bond, was of opinion that nine instalments came within the period of limitation, and under this view he awarded payment of Rupees 397-7-6, as principal and interest, with Rupees 63-13-4 as costs; but in appeal in the Court of the Assistant Judge, and again on a further appeal

1849
30th March.

in the Court of the Joint Judge, the decision was reversed, on the ground that the claim was excluded under the Law of Limitations, the bond bearing date *Shuké* 1745, A. D. 1823-24, and the suit having been instituted in *Shuké* 1764, A. D. 1842-43.

W. Simson, Esq.

A special appeal was next admitted in the Sudder Dewanee Adawlut, at the instance of the original plaintiff, on the ground that it was a departure from practice not to allow the period of limitation to reckon from the date of the last instalment payable on the deed; and the case going before the single Judge, he held, that in accordance with several decisions of the Sudder Dewanee Adawlut, and with the spirit of the law, all the instalments which fell due within twelve years from the date of filing the suit were recoverable. Under this view, he referred the case to be tried by a full Court, as he could not confirm the decisions of the two lower Appellate Courts; and the full Court, concurring in opinion with him, the decree of the Joint Judge was annulled, and the case was remanded to the Zillah to be tried on its merits, it being ordered, at the same time, that the costs should be apportioned agreeably to the ultimate decision of the case.

P. W. LeGeyt, Esq.

Messrs. A. Bell, John Warden, P. W. LeGeyt.

No. 2409, Special.

PANDOORUNG BABOOROW.....*Appellant,*

*versus*

NAROO BIN SOOBANJEE, deceased, his Heir HURRY BIN NAROO, a Minor, by his Mother, who was also his Guardian, BHAGEERTHEEBAEE.....*Respondent.*

*Rupees* 32-11-10.

[In a suit entered by a *khot* on a *kuboolayut* passed by his tenant, it was held in special appeal by the Sudder Dewanee Adawlut, that it was not necessary that the instrument should be on stamped paper, the plaintiff being *khot,* or landlord, and the *kuboolayut* relating to rent.]

1849
30th March.

This was a claim entered in the Court of the Moonsiff of Malwan, in the Rutnagherry division of the Konkun Zillah, by Pandoorung Baboorow, as village *khot*, to recover from Naroo bin Soobanjee and his security Rupees 60, as the rent of a field he had let to the said Naroo bin Soobanjee under a *kuboolayut;* which *kuboolayut,* it was contended for the defence, was a forgery; and it was also pleaded that the rent had been already paid to another person, who was the rightful *khot.*

The Moonsiff found that the defendant was indebted to the plaintiff in the sum of Rupees 32-11-10, on account of the rent of the field in question, and he awarded payment thereof accordingly, but in appeal the Senior Assistant Judge took a different view of the case, as set forth in his minute. He observed:— "The appellant (the defendant in the original suit) passed a *kuboolayut* in the year 1839, agreeing to pay rent according to the survey, for the fulfilment of which the second defendant stood security: on a

1849
30th March.

perusal of this agreement, it appears that it is a mutual settlement between themselves—the Government has nothing to do with it; and, therefore, it ought to have been on stamped paper." And under this view, and as the amount was above Rupees 16, he held that the document on which the claim rested was invalid, and reversed the decree of the Moonsiff.

Whereupon the original plaintiff prayed the admission of a special appeal in the Sudder Dewanee Adawlut, which was granted, in view to trying whether it was right to require that an agreement for the rent of land given in cultivation should be on stamped paper; and the case going before the single Judge, he recorded the following minute in it:—

W. Simson, Esq.

P.W.LeGeyt,Esq.

"The point to be decided is whether an agreement between a landlord and his tenant to pay a certain rent must be on stamped paper. The contracting parties in the case are the *khot** of a village, and a *ruyut* holding ground of him. The *khot* stands in every respect in the place of a landlord by Clause 3rd, Section X. of Regulation XVIII. A. D. 1827, and agreements relating to the rent of land between landholders and their tenants are specially exempted from the obligation of being written on stamped paper; it therefore follows, that the agreement No. 11 of the original suit need not have been written on a stamp. Under this view, I cannot confirm the Senior Assistant Judge's decree; and refer the case to be tried by a full Court."

The full Court adopted this opinion, and accordingly reversed the decree of the Senior Assistant Judge, and remanded the case to be tried on its merits.

Messrs. A. Bell, John Warden, P. W. LeGeyt.

* A *khot* is the renter of a village, whether temporally or hereditarily, in the Tanna and Rutnagherry Collectorates.

No. 2412, Appeal.

ANUNDROW BIN RAMROW, Mukadum Patel. *Appellant,*

*versus*

E. M. SUART, Esquire, Assistant Collector in Charge, Sholapoor.....*Respondent.*

*Rupees* 10.

[Held that the Civil Court has no jurisdiction in a claim to an *inam* in the Deccan under Clause 1st, Section VI. of Regulation XXIX. of 1827.]

1849
30th March.

Anundrow sought in this action to recover a *paoshére* of land, which he stated he held in *inam* in the village of Doomuknal, and which the Assistant Collector in charge had taken possession of as belonging to Government. His claim was laid in the Court of the Zillah Judge of Sholapoor, at ten times the sum for which he had let the land for a year as pasturage; and the Assistant Collector, in disputing it, contended —First, that the suit was not cognizable by the Civil Court under Regulation XXIX. of 1827, Section VI. Clause 1st; Secondly, that the property was undervalued, as it was worth Rupees 1600; Thirdly, that the person from whom the land had been acquired had not the power to grant it in *inam*, not being of the class of officers mentioned in Appendix C. of Regulation XVII. of 1827.

The Zillah Judge delivered judgment in the matter as follows:— "From the evidence adduced in this case, the Court is of opinion that the plaintiff has failed to establish his title to the land. It appears that in the year *Fuslee* 1206, the Nizam gave the village of

1849
30th March.

Doomuknal to Janojee Row Rumba Nimbalkur, in *surunjam*,* which means that he was to hold it at the pleasure of the Nizam, and in consideration he was to maintain a body of troops for the service of the Nizam: in *Fuslee* 1222, the aforesaid Janojee Row granted in *inam* to the plaintiff the land which he now claims. In *Fuslee* 1228, the Nizam removed Janojee from the village, and bestowed it on another person, who held it on the same terms for a period of one year, after which the Nizam removed him also, and appointed a third person, who held it for another year; and then the British Government got possession of it, and has held it ever since. Such being the case, the Court does not consider the deed or *sunud* granted by Janojee Row to the plaintiff a valid one, as, by Appendix C. of Regulation XVII. of 1827, it is laid down that no one save the Nizam himself has power to grant a *sunud* in the Nizam's territories; and, even supposing Janojee Row had authority to make a grant of the nature, the validity of the *sunud* could not be admitted without proof that Janojee possessed full and sufficient authority for the purpose, (Regulation XVII. of 1827, Section XXXIX. Clause 2nd,) there being no evidence whatever on this point. Under such circumstances, the Court is of opinion that the present suit cannot stand, and therefore nonsuits the plaintiff, and decrees that he pay all the costs in the suit."

From this decision an appeal was entered in the Sudder Dewanee Adawlut; and time having been applied for and allowed the appellant (plaintiff) to consider and meet the demurrer of the defendant in

* A *surunjam* is an assignment of land or villages held on the condition of military service.

1849
30th March.

P. W. LeGeyt, Esq.

regard to the non-jurisdiction of the Civil Court in the matter, which, though an important point, was not noticed in the Zillah Court, the following minute was recorded by the sitting Judge :—" This claim is clearly a 'claim against Government on account of an *inam*'; and the respondent met it at the threshold by objecting to the Court's jurisdiction, under Clause 2nd, Section VI. of Regulation XXIX. of 1827. The lower Court took no notice of this objection when brought before it, and decided the case on its merits; but against the appellant the respondent has again urged his objection to the jurisdiction in the appeal. The land claimed by the appellant is now in possession of the Governor in Council, who has been sued by appellant through the officer in charge of the Government interest: it is claimed as *inam* land, and the jurisdiction of the Court is barred by Clause 2nd, Section VI. of Regulation XXIX. of 1827. This view, if correct, will cause the decree of the Zillah Judge of Sholapoor to be annulled, and I therefore refer the case to a full Court."

Messrs. A. Bell, John Warden, P. W. LeGeyt.

This opinion was concurred in by the full Court, and the decree of the lower Court, which disposed of the claim on its merits, was therefore annulled; but the appellant was ordered to pay all costs in both Courts.

No. 2410, Special.

BUHOODEENSHA WULUD ALISHA.....*Appellant,*

*versus*

RUMBAJEE WULUD POOTAJEE.....*Respondent.*

*Rupees* 500.

[Held in a claim to precedence in the procession of *taboots* at the *Mohurum*, that the matter was not cognizable by the Civil Court, but came within the jurisdiction of the Magistrate.]

1849
27th April.

This was a suit instituted by Buhoodeensha, a Musulman, against Rumbajee, a Hindu, to establish his right to take his *taboot* first in the procession of the *Mohurum*, which right he stated was constantly interfered with by the said Rumbajee.

The evidence went to show that the plaintiff was entitled to the precedence he claimed; and he also produced a *mooktiarputr* from the Third Assistant Magistrate, by which such precedence was secured to him; whereupon the Moonsiff of Sungumnair, in the Ahmednuggur Zillah, who tried the suit, passed a decree in his favour, on the grounds that the evidence fully established the claim, and that the defendant, being a Hindu, was not entitled to take a part in a Mahomedan festival.

The defendant then appealed in the Court of the Assistant Judge, representing that when Mr. Marriott was Judge of the Zillah, he issued an order that all disputes as to which *taboot* should be carried first at the *Mohurum* should be submitted to the Magistrate; and that as regarded the dispute between him and the plaintiff, he had only to state that the *taboot* he made

1849
27th April.

belonged to one Mahomed Hoosein, by whom he was employed, and who had papers to show that he was entitled to precedence. The Assistant Judge, however, confirmed the decree of the Moonsiff, on the same grounds, and being of opinion that if Goolam Hoosein had the right alleged, it was for him, and not the defendant, to dispute it with the plaintiff.

Not content, the defendant next appealed to the Zillah Judge, who reversed a decrees of the lower Courts, on the ground that a former decision by a competent Court, viz. a decree passed by Mr. Marriott on the 21st of August 1828, in a former suit instituted by the plaintiff, had been passed, deciding that the claim could not lie in the Civil Court, but came within the jurisdiction of the Magistrate.

The plaintiff, dissatisfied in turn, prayed the admission of a special appeal in the Sudder Dewanee Adawlut, which was admitted, on the ground that claims to *manpan* should be settled by the Civil Court, and that the Zillah Judge was wrong, and went contrary to usage, in throwing the inquiry in this case on the Magistrate. The single Judge, however, when the case was called on for hearing, decided that there was no ground for questioning the correctness of the judgment of the lower Court, which was held to be in strict conformity with usage; and the appeal was accordingly dismissed, with costs on special appellant.

W. Simson, Esq.

A. Bell, Esq.

No, 2445, Special.

BAJEE SUDSHET, Sonar.....*Appellant,*

*versus*

PANDOORUNG RAMCHUNDUR.....*Respondent.*

*Rupees* 100.

[Held in the case of two brothers, who lived separate, but were undivided in interests, that the sale of a portion of the family property by one of them, without the consent of the other, was null and void by Hindu law.]

1849
15th May.

Bajee Sudshét, Sonar, represented, in instituting this suit, to cause the removal of an attachment issued against a portion of a shop, that he had purchased the property from one Ragoo Narayun, and that he was in possession when Pandoorung Ramchundur attached it in execution of a decree against one Dhondeo Narayun, Ragoo Narayun's brother. The answer of Pandoorung Ramchundur was that the plaintiff and Ragoo Narayun, who were related by marriage, had got up this pretended sale to save the property, which in fact belonged to Dhondeo Narayun, his judgment debtor.

The case was tried by the Moonsiff of Malwan, who ordered the attachment to be raised, holding it proved that the plaintiff had purchased the property from one brother when the other brother was a minor; but in appeal, the decision was reversed in the Court of the Senior Assistant Judge, at the detached station at Rutnagherry, on the ground, that although the two brothers, Ragoo and Dhondeo, did not live together, no part of the shop, which formed an undivided property, could be disposed of without their mutual

1849
15th May.

consent, as appeared from the exposition of the Hindu Law Officer,* by whom it was also declared that until a division of the property took place, the sale of any part of it by one brother would be null and void.

W. Simson, Esq.

On the application of the original plaintiff, a special appeal from this decision was admitted in the Sudder Dewanee Adawlut, the sitting Judge, after consulting the *Shastree* of the Court, considering there was reason to suppose that the facts of the case had not been explicitly laid before the *Shastree* of the Zillah Court before he gave his interpretation. The single

A. Bell, Esq.

Judge, however, when the case was called on for hearing, decided that there was no room for such a supposition, and under this view he dismissed the appeal, with costs.

* The questions put to the *Shastree*, and his answers, were as follow :—

*Question.*—Can one of two brothers, before a partition takes place between them, sell his share in a house which is their joint property ; and what part of the said house would be considered as belonging to the elder brother, and what part to the younger ?

*Answer.*—Neither brother can sell his share before separation : the part of the house containing the cook-room and place of worship would belong to the elder brother, and the other half of the house to the younger.

*Question.*—If the brothers live apart, but there has been no partition of property, can the elder brother mortgage or sell his share ?

*Answer.*—Not unless reduced to great distress, or compelled thereto by some urgent reason ; for, though living separately, the brothers cannot be considered divided in law until a partition takes place between them.

No. 2214, Appeal.

SURUSWUTHEEBAEE, Wife of GUNESH RUGOONATH UNGUR.....*Appellant,*

*versus*

ROWJEE BAPOOJEE UNGUR.....*Respondent.*

*Rupees* 3197-7-0.

[A and B entrusted their brother, C, with certain monies, for the performance of the funeral ceremonies of their mother; but, as he did not carry out their intentions, D, the heir of A, instituted a suit for the recovery of his share of the advance, when it was held that the only claim he had, as head of the family, was to the enforcement of the deed of trust in the matter.]

1843
22nd June.

Rowjee Bapoojee Ungur originally sued in the Court of the Moonsiff of Poona to recover from Suruswutheebaee, the heiress of one Ragoo Chitko, her father-in-law, Rupees 3197-7-0, being the third share of certain monies entrusted to the said Ragoo Chitko by his two brothers, Bapoo Chitko, (plaintiff's father,) and Nagoo Chitko, for the purpose of performing at Benares the funeral ceremonies of their mother; which monies the said Ragoo Chitko had misapplied.

The Moonsiff held that the accounts and other documents adduced in evidence were not sufficiently explicit to support the claim, which he therefore rejected, whereupon an appeal was entered in the Court of the Assistant Judge, who referred in the first instance to the *Shastree* of the Poona Adawlut, to ascertain—first, whether, if the money had been received and misappropriated, as alleged by the plaintiff, the defendant, into whose hands it avowedly never went, could be held answerable for the fraud practised

1843
22nd June.

by her father-in-law? and, secondly, whether, in the event of the defendant adopting a son, that son or the the plaintiff would be most entitled to carry out the religious intentions of the three brothers? To these questions, the *Shastree* returned answer—that the defendant would be clearly responsible to the plaintiff, if it could be proved that the money was paid to her father-in-law, and that the plaintiff was more entitled to carry out the intentions of the brothers than an adopted son of the defendant would be.

On receipt of this exposition, the Assistant Judge recorded judgment in the matter. He considered it proved that the defendant's father-in-law had received the money, his accounts of the year *Shuké* 1750 tending greatly to the suspicion that such was the case, for the item was brought to account, as if it was a deposit by a third party; he also considered that the absence of all accounts prior to that date necessarily led to the suspicion that they had been wilfully withheld by the defendant. "The plaintiff," the Assistant Judge proceeded to observe, "produces a copy of a *yad*, executed by the three brothers, in which a provision for lodging the money in question with Ragoo Chitko is made, and, therefore, the Court is of opinion, that if this copy be proved to be genuine, the suit must be considered to be one supported by an acknowledgment in writing, (Section IV. of Regulation V. of 1827,) and treated as such. The Court finds it proved that the original of this *yad* was deposited with Ragoo; it also finds that the attesting witnesses are all dead, but that the best proof available has been adduced, namely, proof of the fact that this very copy is in the handwriting of the defendant's husband,

1843
22nd June.

and the evidence of parties who saw the original, and who deposed that such was its tenor: there is also the evidence of another person who can depose to the fact of a compromise having been attempted between the plaintiff and defendant's husband, in the course of which, the latter admitted the receipt of the money." Taking then the whole of the circumstances of the case into consideration, the Court considered the copy of the *yad* fully proved, and accordingly reversed the Moonsiff's decision.

P. W. LeGeyt, Esq.

A further appeal was then admitted in the Sudder Dewanee Adawlut, when the sitting Judge, after certain accounts had been examined and reported on by an officer of the Court, and the arguments of the counsel on both sides had been heard, recorded the following minute in the matter:—

"This case rests on the degree of credit to be given to the document No. 49: if it is a true copy of a genuine document, then the inference was good, that the entry in *Ashar* 1752, in defendant's accounts, is the very sum described in the document; and it certainly is entered in a way which might lead to the belief that it was not part of the current income of the year. The accounts produced do not show whence it was derived. Still it seems to be taking too much for granted to say that, because this is not shown, that it must be the particular sum claimed; for if the transaction is a fiction, as asserted by the defendant, and the document 49 is a fraudulent and false one, it would naturally have been made to fit the entry. There is, in my opinion, too little proof of the basis of the claim, viz. the document 49, to pronounce a judgment on it; and I am, therefore, not

1843
22nd June.

prepared to affirm the decree of the Assistant Judge, and I refer the case to a full Court."

Messrs. A. Bell, John Warden, P. W. LeGeyt.

The case went accordingly before a full Court, when the Assistant Judge's decree was reversed, and that of the Moonsiff upheld, on the ground that the proof brought forward was insufficient to establish the original plaintiff's claim, whereupon a review of judgment was prayed for by the original plaintiff, and allowed; the case having been reconsidered, judgment was pronounced as follows:—

Messrs. A. Bell, John Warden, P. W. LeGeyt.

"The Court is of opinion that the instrument on which the claim is founded is proved; but on looking to its tenor, it is not of a nature to support the original claim which the Assistant Judge upheld, for it is not an instrument entitling respondent himself to recover money, but a deed purporting to place a certain sum of money in trust with the person whom appellant now represents: and who of course cannot, without breach of trust, give the money to any one, or appropriate it in any manner, otherwise than according to the provisions of that trust; and the only claim, therefore, that respondent ever had, arising out of the provisions of the instrument is,—as head of the family which made over to the person represented by appellant a certain sum, to be expended in a certain way, for the supposed spiritual benefit of their common ancestor,—to enforce the execution of the instrument by the representative of the trustee. Under this view, the decree of the Assistant Judge is reversed, and the parties are ordered to pay their own costs; but this decision is not to be held to bar any proceedings to enforce the due execution of the trust."

No. 2452, Special.

BHAEECHUND NUNDLAL.....*Appellant*,

*versus*

MOTEERAM NARUNDASS.....*Respondent.*

*Rupees* 7-4-0.

[Held in a suit which the lower Court decided should be dismissed under Section XXV. of Regulation IV. of 1827, because it had been adjudicated once before, that as it had only been struck off the file for non-appearance on the first occasion, the plaintiff was entitled to bring a new action in the matter.]

1849
28th June.

Moteeram Narundass, the mortgagee of a hut, having obtained a decree of Court against the mortgagers, took out an attachment on the property; whereupon Bhaeechund Nundlal entered this action to cause the said attachment to be raised, representing that he held a previous mortgage on the property, and also had a lien on it in virtue of a decree of Court against the owners.

The attachment was ordered to be raised by the city Moonsiff of Surat, by whom the case was tried, it being considered that the claim had been established; but the decision was reversed in appeal by the Zillah Judge, on the ground that in a former action, which the plaintiff had allowed to go by default, the matter had been the subject of litigation, and therefore the present suit should have been dismissed under Section XXV. of Regulation IV. of 1827, in having once before been adjudicated.

W. Simson, Esq.

From this decision, a special appeal was admitted in the Sudder Dewanee Adawlut, to try whether the Zillah Judge had acted contrary to law or not, the

1849
28th June.

fact appearing to be that the appellant's (plaintiff's) suit on the occasion alluded to was only struck off for non-appearance, and not adjudicated; and therefore it was considered that he was entitled to bring a new action on the same ground as before.

A. Bell, Esq.

Messrs. A. Bell, John Warden, G. Grant.

This opinion was concurred in by the single Judge, who accordingly referred the matter to a full Court, when the view expressed in the certificate having been held to be correct, the case was remanded to the Zillah, to be tried on its merits, the costs in the Sudder Dewanee Adawlut being ordered to be apportioned on the ultimate decision in the matter.

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No. 2552, Special.

PETAMBER and BHAEESHUNKER, (sons of NUTHOO,) Minors, by their Mother, who was also their Guardian, BAEE AMBER..*Appellants*,

*versus*

JETHA GIRDHUR, a Minor, by his Mother, who was also his Guardian, BAEE SUDA.*Respondent*.

*Rupees* 89-11-10.

[Held in this case that a mortgage was not affected by a subsequent sale, and that as the deed of mortgage was not in the possession of the purchaser, the mortgage was still in force.]

1849
5th June.

One Rugoonath Nursee, in *Sumvut* 1883, A. D. 1827, mortgaged certain property for a fixed period of twenty years to one Jetha Nursee, and in *Sumvut* 1896, A. D. 1840, sold it to one Morarjee Bhowaneeshunker, subject to the mortgage. In *Sumvut* 1901,

1849
5th June.

A. D. 1845, this property was attached in behalf of Jetha Girdhur, in execution of a decree against the mortgagee, Jetha Nursee; whereupon Bhaee Amba, as the mother and guardian of Petamber and Bhaeeshunker, the representatives of Morarjee Bhowaneeshunker, the purchaser of the property, entered this action to cause its release.

The case was tried by the Moonsiff of Kaira, who ordered the attachment to be removed, on the ground that the defendant's title was not good; but his decree was amended in appeal by the Assistant Judge, so far as it related to the claim of Jetha Nursee in the property. It was awarded that Jetha Girdhur should satisfy his demand by the sale of Jetha Nursee's right on the property, and that the costs should be equally divided between the parties. The grounds of the decision were stated as follows:—

"The Court finds the following to be the state of the case:—Rugoonath Nursee mortgaged premises for twenty years to Jetha Nursee, in *Sumvut* 1883, In 1884, Jetha Girdhur obtained a decree against Rugoonath Nursee, Jetha Nursee, and Girdhur Rugoonath, under which decree he attached the premises. This attachment the plaintiffs sought to remove, as the representatives of Morarjee Bhowaneeshunker, and, in support of their case, produced a deed relating to the sale of the house by Rugoonath Nursee to the said Morarjee Bhowaneeshunker. The deed of mortgage by Rugoonath to Jetha Nursee is in Jetha Girdhur's possession. In the opinion of the Court, the premises (in default of any evidence that the agreement by which Rugoonath mortgaged to Jetha Nursee was cancelled) must be held to be his

1849
5th June.

until the expiry of his stipulated term of possession. In the deed by which Rugoonath transfers his right to Morarjee, he makes a stipulation that Morarjee shall pay Rupees 101 on account of the mortgage: there appears no record of Jetha Nursee's consent to this arrangement, though he states that he received the money, and in the mortgage it is stipulated that Rugoonath is not at liberty to remove Jetha Nursee until the expiry of the term of twenty years. The Court, therefore, considers that it is not established that Jetha Nursee's right in the premises is transferred to Jetha Girdhur. Rugoonath's right to the property was, in the opinion of the Court, wholly transferred by his deed of sale to Morarjee."

Cross appeals from this decision were entered by both parties in the Court of the Zillah Judge, which resulted in an amended decree, ordering that the whole of the costs should be borne by the original defendants, the rest of the Assistant Judge's award being confirmed; upon which the said defendants prayed the admission of a special appeal in the Sudder Dewanee Adawlut, representing that they had redeemed the mortgage and taken possession before the expiration of the twenty years, which they were not obliged to wait for; that this being admitted by the mortgagee, their right could not be lawfully disturbed; and that the Zillah Judge had decreed contrary to law in insisting on limiting their right to take possession to the completion of the period of twenty years, and on the liability of the property for a judgment debt due by Jetha Nursee until its completion.

B. Hutt, Esq.

These reasons appeared good to the sitting Judge, if the case would bear them out; and he accordingly

1849
5th June.

John Warden, Esq.

certified that the special appeal was admitted in view to determining this; and the case coming on for hearing, the single Judge before whom it was heard pronounced judgment as follows:—

"The Court is of opinion that on a perusal of the deed of mortgage, the obligations of which are ratified in the subsequent sale, and which, even if they were not so, could not be affected by the sale, its clear meaning is that the mortgage shall not be foreclosed for twenty years, but it was held by the Court of original jurisdiction that the mortgagee Jetha Nursee had conceded his claim on the property, by accepting, before the expiration of the twenty years, the amount for which it was mortgaged to him, and which he stated he did, and that the property had thus become absolutely transferred to the purchaser's representatives. As, however, the deed of mortgage, in redemption of which the amount was professedly paid, was not in the possession (as it ought to have been if redeemed) of the purchaser and person who alleges he redeemed it, but in that of Jetha Girdhur, the respondent in this case, it was in substance held by the Assistant Judge and Judge that the mortgage was in force, and in conformity with this opinion they decreed that the attachment should stand as against the consideration of the mortgage; and this appearing to be equitable, is confirmed. The Assistant Judge divided the costs between the parties: the Judge laid them on the appellants, which is equitable, and is therefore also confirmed."

No. 2414, Special.

KANDASS HUNRAJ, deceased, his Heir RUTEEBAEE, his Mother, by her Manager FAKEERCHUND.....*Appellant,*

*versus*

DAMOTHURDASS GOVURDUNDASS.....*Respondent.*

*Rupees* 90.

[Held that a deed of sale must be stamped; that a mortgage bond gives no absolute right in property; and that non-possession by an alleged mortgager, unless specially provided for, is presumptive evidence against the truth of an alleged mortgage.]

1849
28th June.

This action was entered by Damothur Govurdundass, to cause the removal of an attachment issued against a house and some other property, which, it was alleged in the plaint, had been mortgaged in the first instance to the plaintiff by the owner, and afterwards sold to him; and of which he was in possession at the time the attachment was issued. This allegation, however, was disputed in the answer for the defence, in which it was contended that the property, when it was attached, was in the possession of the owner, from whom the plaintiff pretended to have purchased it.

The Moonsiff of Nundoorbar, in the Ahmednuggur Zillah, pronounced judgment in favor of the defendant, on the ground that the plaintiff's mortgage bond had been cancelled by the subsequent deed of sale, which also was invalid, in consequence of having been executed on plain paper; and another reason was that it had been established that the person stated to have disposed of the property to the plaintiff was in possession at the time it was seized.

1849
28th June.

In appeal, however, in the Court of the Senior Assistant Judge at the detached station of Dhoolia, the decision of the Moonsiff was reversed, it being held that even if the deed of sale were looked upon as worthless, for the reason stated, still the plaintiff had good grounds to sue for the removal of the attachment on the strength of his mortgage bond, which was stamped, and which, being otherwise in legal form, must be held to be in full force.

In praying the admission of a special appeal against this latter decision in the Sudder Dewanee Adawlut, the defendant urged that a deed of sale on unstamped paper was not entitled to be recognized; and that the Moonsiff was right in considering that if it was of any use at all, it was only as showing that the mortgage no longer existed, as was also proved by the fact of the property being in the possession of the original owner, against whom he held the decree in execution of which the attachment had been issued.

In the consideration of this application, it appeared to the sitting Judge that the Senior Assistant Judge had taken a wrong view of the case, and had given judgment contrary to law; and he therefore admitted the special appeal, on the grounds "that a deed of sale on unstamped paper cannot be recognized; that a mortgage bond gives no absolute right in the property, and, even if correct, could be no ground for decreeing the removal of an attachment, the course proper to be taken being laid down in the concluding part of Section LXVII. of Regulation IV. of 1827, *i. e.* to sell it, liable to such claim as may be established to exist, on behalf of the party urging it; and that the non-possession of the property by the mortgager,

B. Hutt, Esq.

1849
28th June.

unless specially provided for, is presumptive evidence against the truth of the alleged mortgage."

A. Bell, Esq.

The single Judge before whom the case was heard concurred in this opinion, and not being prepared, therefore, to affirm the judgment of the Court below, he sent the case before a full Court, by which also the views expressed in the certificate were held to be correct. The decree of the Senior Assistant Judge was accordingly reversed, and that of the Moonsiff upheld, with costs on the original plaintiff.

Messrs. A. Bell, John Warden, G. Grant.

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No. 2522, Special.

YEMOONABAEE, Wife of MEGUS SHAMROW SOMUNT.....*Appellant*,

*versus*

UMROOTROW MYPUT SOMUNT.....*Respondent*.

*Rupees* 36.

[Held that by Hindu law the thing mortgaged must be something positive, and not uncertain and indefinite.]

1849
29th June.

Umrootrow Myput Somunt instituted this action to cause an attachment to be removed from some *kudbee*, representing that Yemoonabaee, having obtained a decree of Court against one Chima wullud Sidoo, attached the aforementioned *kudbee*, which was held by him, the plaintiff, in mortgage. For the defence, it was pleaded by Yemoonabaee, that the plaintiff and her judgment debtor, who were brothers, had got up the mortgage after the attachment, and

1849
29th June.

she also put it to the Court whether such property as the anticipated produce of a field was ever given in mortgage.

The claim was rejected in the Court of First Instance; but in appeal in the Court of the Zillah Judge of Sholapoor it was admitted, on the grounds that the plaintiff held a mortgage on the property, it being specified in the mortgage bond, which was duly registered, that the crops and *kudbee* were the property on which the loan was made; and that the defendant's decree of Court against the mortgager, besides which she produced no other evidence, was of much later date than the plaintiff's mortgage bond.

From this decision, a special appeal was admitted in the Sudder Dewanee Adawlut, on the ground that it was repugnant to the *Shastru*, the Hindu law requiring that the thing pledged shall be something positive, and not uncertain and indefinite, whereas the mortgage deed in this case assigned a future crop; and on this ground, which was fully concurred in, the sitting Judge, and after him a full Court, annulled the decree of the Zillah Judge, with costs on plaintiff.

W. Simson, Esq.

A. Bell, Esq.

Messrs. A. Bell, John Warden, G. Grant.

No. 2518, Special.

KISHUNDASS, *alias* KUCHERDASS, and RUGOONATH MARWADEE.....*Appellants,*

*versus*

KESOO WULUD BAPOOJEE Patel.....*Respondent.*

*Rupees* 61.

[Held that by Hindu law no transfer of property, whether self-acquired or inherited, would be good, so long as debts were left unpaid.]

1849
29th June.

Késoo wulud Bapoojee Patel sought in this action to raise an attachment which Kishundass and Rugoonath had caused to be issued against a *mula*,* and in stating his case he represented that the land was attached as belonging to his father, whereas it was his, (plaintiff's,) as it had fallen to his share, agreeably to a *pharkut* executed when a separation of interests took place between him and his father. For the defence, it was contended that there was no division of interests between father and son; and consequently that the *mula*, which the defendant held in mortgage, could not be the separate property of the latter.

It came out in evidence before the Moonsiff of Rahata, in the Ahmednuggur Zillah, by whom the case was tried, that the *mula* was first mortgaged by the father to the defendant, and then made over by him to his son by a *pharkut*, or deed of separation; but as the conditions of the mortgage bond continued to be acted on, the Moonsiff considered it doubtful whether the *pharkut* was a *bonâ fide* document, and therefore

* A garden, or piece of garden-ground, for growing vegetables, &c.

1849
29th June.

nonsuited the plaintiff, who thereupon appealed in the Court of the Joint Judge of Ahmednuggur, who, in reversing the Moonsiff's decision, recorded the following minute:—

"It is clear that Bapoojee (the father) first mortgaged the produce of the said piece of ground to the defendants, and next made the ground over to his son: the father, perhaps, should not have given over the ground as his son's share of the family property, so long as the conditions of the mortgage, defendants had on it, were unfulfilled; but, having done so, while the son fulfils those conditions for him, the mortgagee has no cause for complaint, for in the *pharkut* it is specially provided that defendants are to have the produce of the land according to the terms of their mortgage. The defendants have obtained a decree against the father apart from this mortgage bond altogether, and they demand the sale of the land mortgaged in execution of this decree; but, it must be remembered, that before this decree was obtained the land was made over to the plaintiff, and therefore, at the time, it could not be regarded as the father's property: the Court cannot decide that the father had no right to give the land under these circumstances, as he gave it cumbered with all demands thereon; and considers that, so long as these demands are satisfied, the plaintiff should retain it as his property. Could it be proved that the object of the father's disposal of the property was fraudulent, and that it was made to evade the execution of the defendant's decree, the case would be very different; but there is no such proof."

In praying the admission of a special appeal in the Sudder Dewanee Adawlut, against this latter decision,

1849
29th June.

the original defendants, through their *vakeel*, contended that the *pharkut* was invalid, as the father was incompetent to pass such a deed while his debts were unpaid; and the point having been referred to the *Shastree* of the Court, he declared, that according to Hindu law, no transfer, either of self-acquired property or of property derived by inheritance, would be good, so long as debts were unpaid; and as, in this case, the plaintiff's father transferred the *mula* to him before liquidating his own debts, the appeal was admitted, on the ground that the judgment of the Joint Judge was opposed to the *Shastru*.

A. Bell, Esq.

The sitting Judge, when the case was heard, concurred in the opinion that there had been a departure from Hindu law in the matter, and he accordingly referred the case to a full Court, when the decree of the Joint Judge was reversed on that ground.

Messrs. A. Bell, John Warden, G. Grant.

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No. 2420, Special.

JUGUNATH ANUND.....*Appellant*,

*versus*

MAHADAJEE RAMCHUNDUR.....*Respondent*.

*Rupees* 6-10-8.

[Held in a claim to a share in a *gaonkee wutun* in the Rutnagherry Collectorate, that absence does not affect a proprietary title; and that as the claim was to recover the position of a *wutundar*, it was not interfered with by Section XIII. of Act XI. of 1843.]

1849
28th June.

This was a claim set up by Jugunath Anund, as *Gaonkur*,* to establish his right to a half share of a third of the *gaonkee wutun* of Moujé Dabolee, which he stated he inherited from his father, the brother of defendant's (Mahadajee Ramchunder's) grandfather, from whence the said defendant inherited the other half, though he unjustly got and retained possession of both half shares. For the defence, it was pleaded that the defendant's grandfather and the plaintiff's father had been divided from the beginning, and that both shares of the third of the *wutun* belonged to the former, and was enjoyed by the defendant's branch of the family under the late as well as under the present Government; and it was also pleaded that even if the plaintiff ever had a title, he lost it by lapse of time, as he could not show that he had possession within a period of 30 years.

The Moonsiff of Sindidoorg decided, (after the case had been returned to him, in view to the claim being laid at the proper amount,) that the plaintiff had established his claim, and ordered his share of the *wutun* to be restored to him; but in appeal, the Senior Assistant Judge of the Konkun, at the detached station at Rutnagherry, reversed the decision, on the grounds that the plaintiff had had no connexion with the *wutun* for 23 years; and that for a long period antecedent to that, he had only held it for one year, which temporary possession, it was considered, was insufficient to constitute a good ground for disturbing the defendant.

* *Gaonkur*, a villager; a term used in the Malwan district of the Rutnagherry Collectorate, answering to *Patel*: a *Patel* or *Koolkurnee* commonly.

1849
28th June.

B. Hutt, Esq.

In appealing from this decision in the Sudder Dewanee Adawlut, the original plaintiff urged, that it having been admitted that he exercised the office of *Gaonkur* (or *Patel*) in A. D. 1820, he could not be said to have forfeited his right from lapse of time; on which point the sitting Judge recorded, that it seemed to him that the Senior Assistant Judge's decree was open to objection, the time during which the opposite party had uninterruptedly enjoyed the right not appearing to be admitted to be such as would of itself give an exclusive right. On this point, therefore, the special appeal was admitted, it being also recorded that it would be for the Court to determine how far Section XIII. of Act XI. of 1843 would interfere with the claim.

John Warden, Esq.

The case then went before the single Judge, who considered that the exhibits* Nos. 30 and 31, the genuineness of which was not disputed in the pleadings, clearly showed that in A. D. 1820-21, the appellant (plaintiff) was in possession of a share of the *wutun*; and that there was nothing adduced to subvert the proprietary right then existing, except absence, which could not affect the proprietary title. He also observed that it was not necessary, as it appeared to him, to connect Section XIII. of Act XI. of 1843 with the claim, the object of that enactment being to secure remuneration to the officiating officer, the balance only of the proceeds of the *wutun* devolving on the co-sharers; and the object of the existing suit being to

* These exhibits were a *kuboolayut* (No. 30), showing that the plaintiff and one Wasoodéw Subajee had contracted for the due payment of the village revenues with the Revenue Authorities in 1820-21; and the village *ijmuilee*, (No. 31, being the rough village account prepared for immediate purposes,) for that year.

recover the position, for much or for little, of a *wutundar:* as he was not prepared, therefore, on these grounds, to confirm the decree of the Senior Assistant Judge, he referred the case for the consideration of a full Court.

1849
28th June.

On the grounds thus set forth by the single Judge, the full Court, adopting his view of the matter, reversed the decree of the Senior Assistant Judge, with costs on respondent (defendant).

Messrs. A. Bell, John Warden, G. Grant.

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No. 2388, Special.

MUTHOORADASS GORDHUNDASS, and DYABHAEE NURSEEDASS.....*Appellants,*

*versus*

LALDASS NURHURDASS, ATMARAM BIKAREE, JUGUNATH DOOLUBH, HURJEEWUN JUGDESH, and UMBARAM MUKUNDASS.....*Respondents.*

*Rupees* 1,750.

[Nature of the engagement to be entered into under Section LXVII. of Regulation IV. of 1827, by a party desiring to stay a sale in execution of a decree.]

Laldass Nurhurdass and the other respondents were the plaintiffs in this case, and represented in their plaint:—"There is a place called 'Nurwan Ukara,' in the Bégum Poora of Surat, near the Nuwab's palace, in which there are temples, tombs, and a dhurmshala, devoted to religious purposes, and there

1849
1st August.

1849
1st August.

is a part of it in which carts stand for hire. The benificiary of the place was one Nurhurdass, who was succeeded by one Jugunath, in whose time a dispute arose about the right of succession, and the matter having gone to Court, a decree was passed in favour of one Balram. Afterwards, in 1835, the appellants, Muthooradass and Dyabhaee, obtained a decree of Court against one Jankeedass, the pupil of Balram, for Rupees 5,480-14-0, in virtue of which they attached the ground, and were on the point of selling it when we interposed, and prayed that the sale might be stayed while we went for a Stamp to write an agreement that we would file a suit to arrest the sale definitively. We went for a Stamp for the purpose, but in the mean time the sale took place, and we were informed that we might file a suit to cause the sale to be annulled. The ground was purchased by the appellants at the sale for Rupees 1,750, at which sum we enter this action and pray that the sale may be annulled.—Laldass Nurhurdass is the heir of Nurhurdass, and the other plaintiffs are worshippers in the temples, and entitled to sue."

For the defence, it was contended by Muthoordass and Dyabhaee, that the plaint was not according to the Regulations, and should be dismissed; that the land in dispute was mortgaged to them in 1830, by Jankeedass Balram, and given into their possession; and that afterwards they obtained a decree against Jankeedass, in execution of which they caused the ground to be attached and sold, and they purchased it themselves.

The Moonsiff who investigated the case nonsuited the plaintiffs, on the grounds that they had not shown

1849
1st August.

that they were entitled to sue in the matter; that a previous sale of a portion of the alleged sacred spot established that it was alienable; and that when it was mortgaged by Jankeedass for the debt for which it was attached and sold, then was the time for the plaintiffs to have interposed to prevent it, if they thought they had a right.

Dissatisfied with this decision, the plaintiffs appealed to the Zillah Judge, who referred the case back for evidence as to the right of the plaintiffs to sue, and this having been obtained and submitted, the Zillah Judge reversed the Moonsiff's decision, on the grounds that he had disposed of the case on insufficient evidence, and being also of opinion that the right of the plaintiffs to institute the suit had been fully established, as it had been proved that the ground was used for religious purposes. Returning the case, therefore, to the lower Courts, he directed the following points to be investigated and cleared up: First, whether the whole of the property mentioned in the deed of mortgage put in by the defendants, or any portion of it, was the private property of the mortgager, independent of the temples of which he was the beneficiary; second, whether the mortgagees (defendants) had held possession of it for fourteen years; third, how much of the money raised on the mortgage had been applied to the public and legitimate purposes of the temples, and how much of it was expended for the private and personal expenses of the mortgager and his predecessor on the *gadee*.

The inquiry into these points resulted in the Moonsiff's passing a decree in favour of the plaintiffs: whereupon the defendants again appealed to the Zillah Judge,

1849
1st August.

who recorded his opinion that it had been proved that "the ground was held for religious purposes, and was public property, in so far that it belonged to the temples," and that "its alienation, except for the legitimate expenses of the temples, was illegal, and the sale of it consequently improper"; on which grounds he upheld the decision of the Moonsiff.

The admission of a special appeal in the Sudder Dewanee Adawlut was next prayed for, the defendants' *Vukeel* urging on their behalf that the decision of the Zillah Judge was illegal—first, because the sale was public, and took place under the prescribed forms and notices; secondly, because the defendants, having bought the property under such circumstances, were not liable to be disturbed in possession; thirdly, because the property had been mortgaged to them seventeen years, and it was publicly known that a decree had been passed in their favour; fourthly, because the plaintiffs had not shown any legal right, as heirs of Jankeedass, to sue for the property, and they were not legally admissible to sue; fifthly, because it was clearly set forth in the agreement between the defendants and Jankeedass that the ground was *umdanee*,* and the debt incurred for the *mundier*.†

P.W.LeGeyt, Esq.

The application was admitted on the file to determine whether it was competent to the Zillah Judge to declare a sale illegal which had taken place under the provisions of Section LXVI. of Regulation IV. of 1827, no steps having been taken to stay the same under the provisions of Section LXVII. of the same Regulation: and the case then coming on for hearing,

John Warden, Esq.

the sitting Judge pronounced judgment as follows:—

* Yielding produce. † A temple.

1849
1st August.

"It appears from the evidence taken by the Zillah Judge that the plaintiffs presented themselves at the time of the sale with money in their hands, and engaged to institute a suit, and left the place of the sale with the avowed object of purchasing a Stamp to fulfil their engagement; but that as they did not return the sale was carried out. The language of Section LXVII. Regulation IV. A. D. 1827 is general as to the nature of the engagement to be entered into, and as the officer superintending the sale accepted the verbal engagement of the respondents, it is not apparent why their return should have been looked for, as the suit was to be instituted in the Court, and not at the place of auction. The decree of the Zillah Judge is therefore affirmed: costs on defendants."

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No. 2551, Special.

JIWA BECHUR.....*Appellant,*

*versus*

MOBUT NUTHOO.....*Respondent.*

*Rupees* 95-8-0.

[Possession is not necessary to the validity of a *sangiro*.]

1849
1st August.

In this suit for the removal of an attachment issued against a house, Mobut Nuthoo, the plaintiff, urged that it had been mortgaged to him by the wife of one Suyud Abooshee Roostoom; and Jiwa Béchur, the defendant, contended that the same person had sold it to the father of one Noorbhaee, who again mort-

1849
1st August.

gaged it to him, defendant, and against whom he, defendant, had obtained the decree of Court, in execution of which the attachment sought to be removed had been issued.

The case was entered in the Court of the Sudder Ameen of Ahmedabad, who, on a first hearing of it, decided that both the sale pleaded by the defendant, and the previous mortgage urged by the plaintiff, had been proved, the deeds in both transactions having been registered; but finding also that the mortgage had been recited in the deed of sale, the purchaser engaging to redeem it as a part of the bargain, he decreed that the attachment should be removed, or that the mortgage should be paid off by the defendant. On a second hearing, however, the case having been remitted to him for further investigation, he affirmed the attachment, on the ground that the defendant's debtor was in possession; and in appeal, the decision was affirmed by the Principal Sudder Ameen, who concurred in the view on which it was founded.

A further appeal was then made to the Zillah Judge, who ordered the attachment to be removed, and that the proceeds of the sale of the house should be first applied to the liquidation of the mortgage, his reasons for the decision being as follows:—"It is admitted by both Courts that the deed of mortgage is valid, and established by evidence; and, further, that the deed of purchase was subsequently executed. In the latter, the mortgage is recited, and the amount is stipulated to be paid by the purchaser as part of the bargain. Subsequently the house was assigned to respondent by deed, on which he obtained a decree against Noorbhace's son. It was incumbent on him,

1849
1st August.

therefore, first, to ascertain whether the mortgage had been paid, or not; and he should have possessed himself of the deed, to produce, in case that fact should be called in question. This he failed to do, either taking it for granted that the mortgage had been redeemed, or knowing that the debt had to be liquidated. The proof was, however, thrown upon him, to show that the plaintiff's claim had been settled, and of this, as the Sudder Ameen observed in his first decree, there is no evidence: no inference is to be drawn from the parties (the plaintiff and Noorbhaee) being brothers, or from possession being established in favour of Noorbhaee."

In appealing against this decision of the Zillah Judge in the Sudder Dewanee Adawlut, the original defendant, after reciting the history of the transaction, asserted additionally that he had a decree on a *sangiro*, in virtue of which he seized the property while in the possession of the person who executed the said *sangiro*, he being the son of the person who purchased it, and who could only have come into possession by redeeming the prior *sangiro* to his brother, the original plaintiff. On this representation, the sitting Judge stated that it appeared to him that the Zillah Judge had decided contrary to the custom of the country in giving judgment in favour of a person claiming on a *sangiro* without possession, to the prejudice of the defendant, whose seizure of the property amounted to a taking possession, his decree being founded on a similar instrument, and executed by the person who could only have obtained possession by redeeming the mortgage on which the suit was founded.

B. Hutt, Esq.

1849
1st August.

John Warden, Esq.

It was, therefore, certified by the sitting Judge, that on these considerations the application was admitted on the file; and the case then coming on before the single Judge, he pronounced judgment on the matter as follows:—

"The Court observes that it is assumed in the certificate that the defendant's judgment debtor could only have obtained possession of the house by redeeming the mortgage on which the suit was founded: but, as stated in the Judge's decree, the mortgage is recited in the deed of purchase, and the amount was stipulated to be paid by the purchaser as part of the the bargain. Possession, moreover, is not necessary to the validity of a *sangiro*,* and it cannot, therefore, be inferred, from the debtor having possession of the house, that he had redeemed the mortgage in question, of the deed establishing which, moreover, he had not received possession. The decree of the Zillah Judge is clearly stated, and apparently quite equitable, and is therefore affirmed; costs on defendant."

* A pledge for a loan, which is only surrendered in the event of principal and interest not being paid according to agreement.

No. 2400, Special.

LUXMUNDASS SHUNKURDASS, and BAPOO SHASTREE BIN MAHADEO SHASTREE.....*Appellants,*

*versus*

ROWJEE ABAJEE GORBOLEH.....*Respondent.*

*Rupees* 225.

[Held that in suits to raise attachments from property, the *onus probandi* should be on the defendant, to prove the title on which he caused the attachment and forced the opposite party to prosecute him, if the said opposite party is in possession, and claims to hold independently, and where no collusion between him and the owner is imputed.]

1849
6th September.

This suit was for the removal of an attachment issued by Rowjee Abajee Gorboléh against two fields, in execution of a decree of Court. It was entered in the first instance by Luxmundass Shunkurdass alone, who claimed the release of the fields in virtue of a mortgage on them; but on Bapoo Shastree's asserting a claim to a portion of them, in virtue of another mortgage, he also was admitted to sue. For the defence, Rowjee Abajee Gorboléh contended that the mortgage bond produced by Luxmundass was a forgery.

The Moonsiff of Rutnagherry, who tried the case, found that both the plaintiffs had been in possession for a period exceeding thirty years, and finding also that the mortgage bond of Luxmundass had been proved to be a genuine document, he ordered the attachment to be raised.

In appeal before the Senior Assistant Judge of the Konkun this decision was reversed, on the ground that the mortgage bond of Luxmundass, the validity

1849
6th September.

of which had been so readily admitted by the Moonsiff, was to be received with great suspicion, as it was not only an imperfect copy, but unattested; and it was further considered that, besides its being unusual to make copies of such documents, the plaintiff Luxmundass had failed to show any necessity for making a transcript in this particular instance, while the original was in existence. The Senior Assistant Judge also recorded that it was an unauthorized act to admit Bapoo Shastree as a plaintiff in the suit, in the manner the Moonsiff had done, as Regulation IV. Section XLVI. A. D. 1827, relating to heirship, did not apply.

B. Hutt, Esq.

A special appeal from the latter decision was admitted in the Sudder Dewanee Adawlut, at the instance of the plaintiffs, on the ground that the Senior Assistant Judge had acted contrary to law in setting aside a claim which was founded on possession for more than thirty years, merely because a certain document was not a perfect instrument.

John Warden, Esq.

It was held by the single Judge, however, when the appeal came on for hearing, that there was no departure from law in the decision of the lower Court, the claim of the plaintiffs having been founded on an instrument, the genuineness of which was disallowed on sufficient grounds. The decision was accordingly affirmed, but on a second hearing of the matter, a review of judgment having been applied for, the following minute, taking a different view of the subject, was recorded by the same Judge, in sending the case before a full Court :—

"A motion has been made for a revision of the decree in this case, on the ground that in the existing decision this principle has not been adverted to, viz.

1849
6th September.

that where no collusion between the owner and possessor is imputed, a person attaching property of which another is in possession, and which that person claims to hold independently, is bound to prove his right to oust the possessor; and that although the procedure prescribed by the Regulation forces the possessor to become a plaintiff to raise an attachment, such procedure cannot alter the right of property; and the defendant is as much bound to prove his right to disturb possession, as if the claim against the possessor had been made by him whom the attacher avers to be the owner, and who would in such case be obliged to establish a title to oust the possessor; the possessor, it might be, remaining silent, or at most, pleading prescriptive right. In short, that in suits to raise attachments from property held as described, the *onus probandi* should be on the defendant, to prove the title on which he caused the attachment and forced the opposite party to prosecute him.

"Considering this a fair principle which has been overlooked in this case, the review is admitted: and as under this view, I am no longer prepared to confirm the decision of the Zillah Court, this case is submitted for the consideration of a full Court."

The full Court, when the case came on for final decision, reversed the decree of the Senior Assistant Judge, and upheld that of the Moonsiff, for the reasons set forth by the single Judge.

Messrs. J. Warden, P. W. LeGeyt, G. Grant.

No. 2413, Special.

SUJUNBHAEE WULUD RAHIMBHAEE.....*Appellant*,

*versus*

GOVIND TRIMBUK, his securities, LOBAJEE WULUD DURKOJEE, and JIJOJEE WULUD DAMAJEE.....*Respondents.*

*Rupees* 55-7-0.

[In a suit on a bond for which it had not been shown that full consideration had been given, it was held that the claim, to the extent admitted by the plaintiff, was not barred under Section IX. Regulation V. A. D. 1827.]

1849
6th September.

This was a claim to Rupees 73-8-6, principal and interest due on a bond passed by Govind Trimbuk to Sujunbhaee for Rupees 50, the former contending for the defence that only Rupees 40 of the sum agreed for had been given to him, and that the latter had recovered Rupees 86-8-0 on another bond transferred to him in security.

The Sudder Ameen of Seroor, who tried the case, nonsuited the plaintiff under Section IX. of Regulation V. A. D. 1827, on the ground that full consideration for the bond had not been given; and it being held, therefore, that the plaintiff was not entitled to recover even the sum acknowledged by defendant to have been received.

The case was then appealed to the Assistant Judge, who recorded, that although it had not been proved that the full amount had been given to the defendant, yet there was nothing in the wording of the law quoted to bar the plaintiff from recovering the Rupees

1849
6th September.

40, which the defendant admitted having received: he accordingly awarded payment of that sum, with interest according to the provisions of the bond, at 24 per cent., up to the date of decision in the Sudder Ameen's Court.

A further appeal was next made to the Joint Judge by the original defendant, when the decree of the Assistant Judge was reversed, and that of the Sudder Ameen upheld, the opinion of the latter being concurred in that the bond was null and void for the reasons stated.

W. Simson, Esq.

From this latter decision a special appeal was admitted in the Sudder Dewanee Adawlut, on a doubt whether the meaning of the law quoted had not been mistaken by the lower Court; and the case going before the single Judge, he observed that by the enactment, written acknowledgments are not conclusive, if the defendant show that full consideration has not been received: but that this claim, to the extent of Rupees 40, was established irrespective of the bond, and entirely independently of it, upon the best and most conclusive of all evidence, viz. the acknowledgment of the debtor in Court: he was therefore of opinion that the Assistant Judge's decree should be upheld, and consequently referred the case for the consideration of a full Court.

John Warden, Esq.

Messrs. John Warden, P. W. Le-Geyt, G. Grant.

The full Court, concurring in this opinion, reversed the decree of the Joint Judge, and upheld that of the Assistant Judge.

No. 2446.

KUPOORCHUND HURUKCHUND.....*Appellant,*

*versus*

DADABHOY RUTUNJEE .....*Respondent.*

*Rupees* 75-1-10.

[Responsibility by Hindu law for the debts of a deceased person of the parties who take his assets.]

1849
6th September.

This was a suit to recover on an account current. It was instituted by Dadabhoy Rutunjee, who represented in his plaint that he had an account with one Néhalchund, who was deceased, and whose assets had been taken by his widow, and three other individuals, among whom was Kupoorchund Hurukchund; and that he therefore laid his claim against all those persons. For the defence it was pleaded that none of the parties proceeded against had succeeded to any property belonging to the deceased, Néhalchund.

It was held by the Sudder Ameen of Surat, by whom the case was tried, that it had been established that Néhalchund died indebted to the plaintiff, and that property had been taken away from his godowns after his decease by all the defendants excepting his widow; and this being the case, he ordered that the plaintiff should recover to the extent of Rupees 75-1-10, the amount of his claim, from the said defendants, the said widow excepted.

In appeal, this decision was affirmed in the Court of the Zillah Judge, who was of opinion that the plaintiff had established by evidence which the defendants had been unable to impugn, that the debt was due by

1849
6th September.

the deceased Néhalchund; and that the defendants, immediately on that person's demise, took possession of all the property belonging to him in his shop and godowns. It was held, therefore, that the Sudder Ameen's decree was in accordance with Hindu law, which provides that whoever takes the assets is responsible for the debts.

P.W.LeGeyt, Esq.

From this decision, a special appeal was admitted in the Sudder Dewanee Adawlut, at the instance of Kupoorchund Hurukchund, (the other defendants having appealed separately) on the ground that it (the decision) was founded on a point of Hindu law, the soundness of which there seemed reason to doubt, viz. that if a party take possession of any portion of the property of a deceased person, he becomes liable for all his debts, without reference to the amount of the property so taken possession of.

John Warden, Esq.

The case then going before the single Judge, he referred it to a full Court, recording the following minute in doing so:—"As it is not shown on the one side, or admitted on the other, that the property which is proved to have been taken, was taken in virtue of real or supposed inheritance, the *Shastree* of the Court pronounces that the appellants (defendants) are liable for the demands on the deceased person, to the extent only to which they became possessed of his property; and I am not therefore prepared to confirm the decrees of the lower Court. I refer the case to the consideration of a full Court."

Messrs. John Warden, P.W. LeGeyt, G. Grant.

The full Court concurred in the opinion of the single Judge, and accordingly reversed the decrees of the lower Courts, as far as they affected the original defendants, who had been held responsible.

No. 2473, Special.

PURSHOTUMDASS MANIKLAL.....*Appellant,*

*versus*

CHOTOOMUL MEHERCHUND.....*Respondent.*

*Rupees* 395-1-6.

[A, having obtained a decree against B, attached a debt due to him by C, whereupon D sought the removal of the attachment, on the grounds that he had undertaken, on the insolvency of B, to recover his outstandings, and settle his affairs, and that C was one of his debtors; but it was held that as A had not agreed to the arrangement, he was not bound by it.]

1849
6th September.

Chotoomul Méhérchund instituted this suit, and represented as follows:—

"Purshotumdass Maniklal, the defendant, obtained a decree against Pranjeewandass Bhookundass, the manager of the firm of Pranjeewandass Jumnadass, and Pranjeewandass Nurseedass, and the manager of the firm of Rutunjee Morar, named Gopal Rutunjee, being indebted to the firm of Pranjeewandass Jumnadass in the sum of Rupees 395-1-6. Purshotumdass has attached the debt in satisfaction of his decree; but previously to this, Pranjeewandass Bhookundass and Pranjeewandass Nurseedass declared themselves bankrupt, and agreed to compromise their debts at four annas per Rupee, an arrangement to which all their creditors consented; and the managers of the firm placed the *Dufturs* in my hands, to enable me to collect their debts: they also passed me a bond for Rupees 5,000, and paid their creditors through me; and under these circumstances, the firm of Pranjeewandass has nothing to do with this debt due from

1849
6th September.

the firm of Rutunjee Morar, and how then can the creditors of the manager of the firm have any claim to it? And yet the defendant has issued an attachment against it, in satisfaction of a claim he has against the said manager. I pray that the attachment may be caused to be removed."

To this Purshotumdass Maniklal answered :—" The debt should be placed at my disposal. The story of the bankruptcy has been trumped up by the managers of the firm and their creditors to defraud me: from the plaintiff's own statement it is clear that the *dustuiwuj* is not a valid document; and if it be allowed that the members of a firm are at liberty to disclose themselves insolvent and mortgage all their outstanding debts, how is trade to be carried on? Moreover, it appears that all the money due on this *dustuiwuj* has not been paid, which alone renders it invalid. I also contend that *dufturs* cannot be mortgaged."

The claim was rejected by the Principal Sudder Ameen of Surat, on the ground that the plaintiff had altogether failed to establish it; but his decree was reversed in appeal by the Zillah Judge, who observed that the bond, by virtue of which the plaintiff claimed the removal of the attachment, was given to him by the firm of Pranjeewandass when it declared bankruptcy, at which time it mortgaged to him all its outstanding debts, together with its *duftur*. It was also observed by the Zillah Judge, that the decree of the defendant, in virtue of which he had attached the debt, was not passed for some months after this transaction had been concluded; and it could therefore give him no authority over the debts of the firm, which had been previously mortgaged to the plaintiff.

1849
6th September.

A. Bell, Esq.

From this decision, the defendant prayed the admission of a special appeal in the Sudder Dewanee Adawlut, when the following review of the case was taken by the sitting Judge, in admitting the application, on the ground that the Zillah Judge's decision was opposed to the usage of merchants:—"The defendant was a creditor of the firm of Pranjeewandass Jumnadass, which firm became insolvent; but he refused to sign the certificate; and commencing proceedings against the firm obtained judgment for the amount of his debt, on which judgment he attached a sum of Rupees 395-1-6, due by one Gopalbaee Rutunjee to it. To raise this attachment was the object of the present action; the attachment was upheld in the Court of original jurisdiction, but was ordered to be removed in appeal before the Zillah Judge, on the grounds that after the firm had become bankrupt the partners mortgaged all the outstanding debts to the opposite party (plaintiff), and passed their bond to that effect; which bond, being of prior date to the defendant's judgment, invalidated his claim against the debts of the firm."

John Warden, Esq.

The case then went before the single Judge, who recorded the following minute in referring the matter for the consideration of a full Court:—

"The firm of Pranjeewandass Jumnadass becoming bankrupt, obtained the consent of some of the creditors to take four annas in the Rupee; and an instrument was executed between the representatives of the late firm and Chotoomul Méhérchund (the plaintiff), by which the former was to pay the latter Rupees 5000, in consideration for which the latter was to pay the quota agreed on to the creditors, and recover debts due

1849
6th September.

to the firm by prosecution if necessary, in the name of the firm or its representatives. To this compromise, one of the creditors, viz. the defendant, was not a party; and he having prosecuted, and obtained a decree against the late firm, he attached one of its debts due by one Gopal Rutunjee. The plaintiff sought to raise the attachment in virtue of the instrument that passed between him and the bankrupt firm.

"Even if the arrangement between Chotoomul and the firm be either customary or equitable, it clearly was not feasible, without at least the consent of all the creditors of the firm; and even by the instrument on which Chotoomul claims to raise the attachment, he was bound to prosecute the debtors who did not pay him. Of these Gopal Rutunjee was one, for he paid his debt into the Adawlut, and the defendant attached it; and this attachment cannot be removed at the instance of Chotoomul, seeing that he was to prosecute those who did not pay him what they owed the firm; and that before he had carried out this most important step for the recovery of the monies assigned to him, this item had been attached at the instance of a creditor, who was no party to the arrangement entered into with him by the bankrupt firm. I am not, therefore, prepared to confirm the decree of the Zillah Judge, and refer this case for the consideration of a full Court."

The full Court, concurring in this view of the case, reversed the decree of the Zillah Judge, and ordered the costs to be borne by the original plaintiff.

Messrs. John Warden, P. W. Le-Geyt, G. Grant.

No. 2448, Special.

RUNCHORE WULUBRAM.....*Appellant,*

*versus*

KAESEERAM HURRYBHAEE, MUYESHWUR HURRYBHAEE, JAYBHAEE HURRYBHAEE, and HURRYBHAEE JOGESHWUR.....*Respondents.*

*Rupees* 481-4-0.

[Held in a suit for the possession of certain property, a part of which had already been adjudged to the plaintiff in another suit, that under Section XXV. of Regulation IV. of 1827, the matter, as regarded so much of the claim, should not have been re-adjudicated.]

1849
6th September.

The original action was brought by Runchore Wulubram to recover possession of a house.

He represented that one Jugnéshwur Jagéshwur executed a deed in his favour for the sum of Rupees 64, assigning a house and field in security, and stipulating that if the money was not paid within eighteen months the redemption should be foreclosed,—that default being made, an action was commenced by him against Amba, the widow of Jugnéshwur, and a decree was passed in his favour, adjudging him a title to a half, or Jugnéshwur's share in the house, on his paying the portion of that person's lien on the property which was held in mortgage by Hurrybhaee Deoduț, the father of the three first defendants, (Kaeseram, Muyeshwur, and Jaybhaee,) and amounted in full to Rupees 150,—that the value of the house being estimated at Rupees 700, the half, or Jugnéshwur's share, was Rupees 350, and deducting Rupees 75 due on the mortgage, there remained Rupees 275, or

1849
6th September.

Company's Rupees 240-10-0, and that the claim was laid at double this amount, or Rupees 581-4-0 to recover the whole of the house; the part interest in which, belonging to Jugnéshwur's brother, Hurrybhaee, the fourth defendant, having been also purchased by plaintiff.

The three first defendants, sons of the mortgagee Hurrybhaee, put in an answer to the plaint, contending that the house was the joint property of Jugnéshwur and Hurrybhaee, and that it was not in the power of the former to dispose of it in the manner represented. The extraordinary terms of the mortgage, by which property valued at Rupees 700 had been alienated for ever for the small sum of Rupees 64, were also adverted to, and the fact of the plaintiff not taking possession was also insisted upon. The defence further alleged that the house was purchased by their father for Rupees 207, the title-deeds being made over to him at the same time.

To this a reply was was filed by the plaintiff not materially altering the former statement of the case, but setting forth additionally that Amba, the widow of Jugnéshwur was heir, and not fourth defendant, Jugnéshwur's brother.

A rejoinder was then put in for the defence, recapitulating the former averment, and adding that Amba, the widow, had acted collusively: and that as the two brothers had resided together, the whole of the estate vested in Hurrybhaee, the fourth defendant, as heir. It further alleged that fourth defendant's exclusion from the suit instituted against Amba was fraudulent, and that the present action was improperly brought.

1849
6th September.

Finally, a supplemental petition was filed by the plaintiff, praying that the alleged sale set up by defendants might be cancelled.

The Moonsiff of Oomrut, by whom the suit was tried, found that the interest, to the extent of a moiety, representing Jugnéshwur's share in the house, had been already decreed to the plaintiff, who was ordered to discharge the portion of the mortgage held by Hurrybhaee, which amounted to Rupees 75. The Moonsiff was of opinion, however, that the alleged purchase of the remaining portion from the fourth defendant was not in any way established, the witnesses examined to prove it contradicting each other, and some of them being related to the plaintiff, who also failed to explain his reason for not taking possession. The Moonsiff then adverted to the defence, according to which the first defendant set up a title as purchaser under a deed of sale; this deed the Moonsiff considered fraudulent and fabricated, for the purpose of setting aside the title advanced by the plaintiff. This was proved, he thought, from the fact of the father (Hurrybhaee) having, in an examination conducted after the date of the alleged sale, suppressed all mention of it; and also from the great discrepancy in the evidence by which the document was sought to be upheld. Having noticed this at length, with a view of bringing forward the conduct of first defendant, the Moonsiff affirmed the plaintiff's rights to a moiety of the house, and nonsuited him as to the remaining portion claimed under the deed of sale.

From the Moonsiff's decision both parties appealed to the Zillah Judge, who pronounced judgment as follows:—

1849
6th September.

"The Court finds that the action brought by the original plaintiff was to recover possession of a house from the three first defendants, as the sons and heirs of Hurrybhaee Deodut, who was said to have a lien upon it to the amount of Rupees 150. The plaint alleged that the said house, together with some land, had been mortgaged to the plaintiff by Jugnéshwur Jagéshwur for the sum of Rupees 64, the mortgagee covenanting to resign his entire interest in the property if he omitted to pay the money before the expiration of eighteen months: default being made, an action was brought against Amba, described as Jugnéshwur's heir, and a decree was pronounced in the plaintiff's favour, and he was declared entitled to a moiety on payment to the father of the three first defendants of the sum of Rupees 75, the portion of the mortgage due by Jugnéshwur. The plaint then declared that subsequently the remaining portion was purchased from the brother of Jugnéshwur, and the present action was to recover the whole of the house in the possession of original defendant as the heir of the mortgagee, and to obtain an injunction against any opposition being made by the seller, Hurrybhaee. The Moonsiff having found that Jugnéshwur had alienated his share, as proved by the decree passed in favour of original plaintiff in the action instituted against Amba, the widow of Jugnéshwur, decreed him possession of a moiety, but rejected his claim under the alleged deed of sale executed in his favour by fourth defendant.

"The Court having duly considered the whole of the proceedings in the case, dissents from the view adopted by the Moonsiff in respect to the moiety ad-

1849
6th September.

judged to be the right of the original plaintiff: it is not disputed that the house in question was the property of the two brothers Jugnéshwur and Hurrybhaee, and that it is descended to them from a common ancestor, and was ancestral property: it was first declared that the brothers had separated, but this assertion was subsequently withdrawn, the plaintiff confessing, in answer to a question put to him, that he could not positively say that they had divided: on this very material point no evidence was adduced, and unity must be presumed as a matter of course. That such was really the state of the family may be further inferred from the circumstance of the mortgage held by the father of the first three defendants having been executed by both brothers conjointly, which plaintiff put to the proof by the production of the former decree passed in his favour; and taking that to be the situation of the parties, the law is clear that one brother, except in case of great necessity, is incompetent to mortgage undivided property, and it should therefore have been shown what cause existed to compel Jugnéshwur to submit to such exorbitant terms as plaintiff insisted upon for the small accommodation of 64 Rupees, and which the Moonsiff who tried the case against Amba, entertained such serious doubt of, as to summon certain witnesses whom he styles respectable, to assist him in his conclusion on that point. The very different terms made by the fourth defendant, assuming the validity of the deed of sale, show at once that he would not have been a party to an entire alienation of the property for so trifling a sum; for be it observed, that though the decree adjudged a moiety of the house only to plaintiff, the deed executed by

1849
6th September.

Jugnéshwur assigned the whole of it. Then, if it be taken that the brothers had not divided their paternal property, the heir of Jugnéshwur was Hurrybhaee, the fourth defendant, and not the widow Amba; and the decree against her can in no wise, therefore, affect the former, who was purposely, as it would appear, excluded from the suit. In the opinion of the Court, therefore, it is clear that the suit was got up, as alleged in the defence, collusively between the plaintiff and Amba; and it is a matter for regret that any Moonsiff should have given it effect. In regard to the deed of sale, the Court is of opinion with the lower Court, that there are good grounds for considering it fictitious, and at all events that it has not been established; and the Court accordingly reverses so much of the decree as adjudges plaintiff a moiety of the house to the disturbing defendant in possession thereof, and affirms the nonsuit in regard to the claim to the other half, under the deed of sale executed by fourth defendant, Hurrybhaee. The Moonsiff having reflected on the conduct of defendant in producing a deed which he prouounces fraudulent, the Court records that the fact on which the Moonsiff relies for his opinion of the matter, viz. that Hurrybhaee the father suppressed all mention of the purchase, is open to this objection—that the witness only answered to certain questions put to him and was not examined on oath."

A special appeal from this latter decision was admitted in the Sudder Dewanee Adawlut, on the ground that it was doubtful whether the re-adjudication of the appellant's (plaintiff's) right to a moiety of the house which had been adjudged to him under his mortgage in the suit against Amba, was lawful; but

P.W.LeGeyt, Esq.

1849
6th September.

in regard to the nonsuit in both Courts on the claim founded on the purchase from Hurrybhaee, it was considered that no cause for special appeal had been made out.

John Warden, Esq.

This point having been considered by the single Judge, he recorded that as it was evident from the pleadings that the claim to the moiety of the house had been already adjudicated "in a suit," the decree of the lower Court, so far as it re-adjudicated that claim, must, under Section XXV. Regulation IV. A. D. 1827, be set aside; and he therefore referred the case to a full Court, when judgment was delivered as follows:—"The Court is of opinion that agreeably to Section XXV. of Regulation IV. of 1827, the question of the right to the moiety of the house, which the appellant held in virtue of the decree passed in his favour in 1833, should not have been re-adjudicated; and under this view, the decrees of the lower Courts, so far as they affect this part of the claim, are hereby set aside,—the nonsuit disallowing the claim to the other moiety of the house being affirmed; costs on appellant."

Messrs. John Warden, P. W. Le-Geyt, G. Grant.

No. 2474, Special.

ISHMALJEE WULUD MAMOODJEE, ESOOBJEE WULUD ULJEE, and HUSUNJEE WULUD ABDOOLJEE.....*Appellants*,

*versus*

HOOSEINJEE WULUD ABDOOLJEE, deceased, his Heir ESUBJEE WULUD ADUMJEE, HUSUNJEE WULUD IBRAMJEE, deceased, his Son and Heir MOOSHAJEE WULUD HUSUNJEE, ISHMALJEE WULUD AHMEDJEE, deceased, his Uncle and Heir MAMOODJEE WULUD DHONDJEE, MAHOMED ESOOB, deceased, his Son and Heir ULJEE WULUD MAHOMED.....*Respondents*.

*Rupees* 150.

[Held in a suit to establish a right to danceround the *ulawa*, at the *mohurum*, which was decided in favour of the plaintiffs, agreeably to the usage of the country, that it is not the province of the Adawlut to decide a religious matter, and that the usage of the country takes precedence of religious law.]

1849
6th November.

The respondents were the original plaintiffs, and sought to establish their right to dance round the *ulawa*, or fire-hole, during the *mohurum* in the hamlet of Sakreenatha, laying their claim as follows:—

| | |
|---|---|
| Estimated value of the right of dancing round the *ulawa* in a piece of ground 30 cubits square, every alternate night, during the ten nights of the *mohurum* is Rupees 10, which at ten times that amount to establish our right..... | Rs. 100 |
| Value of the said piece of ground..... | 50 |
| Damages on account of interruption..... | 50 |
| | 200 |

1849
6th November.

The plaint went on to represent the great antiquity of the right, and that it was supported by an agreement with the defendants, as well as by the result of a former trial before an Assistant Principal Collector, and by a Mamlutdar's *sunud* granted in the time of the Peishwa.

The appellants did not appear to defend the case, which was accordingly disposed of *ex parte;* and it having been held that the plaintiffs had established their right to dance round the *ulawa* five alternate nights of the *mohurum*, a decree to that effect was passed in their favour, but the claim to damages was rejected.

The defendants then appealed in the Court of the Senior Assistant Judge, at the detached station of Rutnagherry, representing that it was against their religious law to perform the right in dispute before the Musjid; and that, as the performance was the cause of breaches of the peace, it was mutually agreed by the parties to share the instruments connected with the ceremony, and perform it in their respeetive hamlets.

On a hearing of the case, the Senior Assistant Judge recorded that it was evident that the matter had been a subject of dispute for many years; that the parties, in consequence, entered into an agreement to perform the rite on alternate nights during the ten nights of the *mohurum;* and that further disputes led to a suit in the Adawlut, which resulted in an agreement on the part of the defendants, on stamped paper, fixing the nights on which each party was to dance.

At this stage of the suit, the Senior Assistant Judge determined on referring the question to the Mahomedan law officer, as to whether there was any prohibition to the *ulawa* dance in the vicinity of the Mus-

1849
6th November.

jid, as urged by the defendants; and the answer of that officer was, that by law all play and noise *(pookara)* during the *mohurum* are prohibited, whether beside the Musjid, or in any place apart from it over the *ulawa*; and, therefore, that it was very improper and contrary to Mahomedan law to play at the *ulawa* beside the Musjid.

The Senior Assistant Judge then pronounced judgment in the matter as follows:—"This reply has reference rather to customs now practised in some parts of India during the festival of the *mohurum*, than to the propriety or otherwise of the *ulawa* being practised near the Musjid; and it appears to the Court that if on this ground alone a decision were given in favour of the defendants, it might be called upon in another case to put down the *ulawa* play, when practised apart from the Musjid, which, if considered as a place of prayer, should be held sacred from noisy games. The Mahomedan law officer informs the Court verbally that the *ulawa* dance is sometimes performed near the Musjid by the more ignorant classes of Mahomedans in the Konkun, and the Court therefore determines on the authority of the agreement on stamped paper (the authenticity of which the defendants admit) to confirm the Moonsiff's decree, inasmuch as the original plaintiffs had a right to play on alternate nights with the defendants during the festival of the *mohurum*, in the place hitherto used for the *ulawa* dance in Sakreenatha."

W. Simson, Esq.

From this latter decision a special appeal was admitted in the Sudder Dewanee Adawlut, on the ground that it was contrary to Mahomedan law as propounded by the Kazee; but when the case went before the

1849
6th November.

P. W. LeGeyt, Esq.

single Judge it was held that it was not the province of the Court to decide a religious matter; and that the usage of the country by Section XXVI. of Regulation IV. of 1827 took precedence of the religious law, which usage in this instance the plaintiffs had in their favour. It was therefore declared, that the right sought for had been rightly determined, the usage of the country having been admitted by the written acknowledgment of both parties to be in the favour of the plaintiffs, and that whether this usage was contrary to the Mahomedan law or not, was a question which need not arise in the suit; and it was also considered that no decision in the suit precluded the enforcement of any pains and penalties that might be incurred by either party for infringement of their religious law. Under this view the decree of the lower Court was confirmed, with costs.

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No. 2444, Special.

BAPOO WULUD MAHOMED ALI.....*Appellant*,

*versus*

OOMERKHAN WULUD DAOODKHAN.....*Respondent*.

*Rupees* 0-8-3.

[A claim to *manpan* for the performance of certain ceremonies was rejected, on the grounds that it was optional to have the ceremonies performed, and that the plaintiff had not been called on to perform them.]

1850
23rd January.

This was a claim to the *manpan* honors and privileges attached to the office of *Mokudum* of Moujé

1850
23rd January.

Gireea, and pét Viziadroog, in the Rutnagherry Collectorate.

The suit was instituted by Bapoo against Oomerkhan, and laid as follows :—

| | | | |
|---|---|---|---|
| Privileges of receiving a cocoanut and some betel-leaves and betelnuts; and of washing hands in a ewer at marriages and on other festive occasions, valued at 9 pies, which, at ten times the amount to establish a right to the *wutun*, is..... Rs. | 0 | 7 | 6 |
| Damages on account of the privileges having been withheld by the defendant on the occasion of the marriage of his granddaughter..... | 0 | 7 | 9 |
| Value of the *wutun*..... | 0 | 0 | 9 |
| | 1 | 0 | 0 |

It was held by the Court of original jurisdiction that the plaintiff's right to the office of *mokudum* was established by a *sunud* from the former Government, and by two decrees of Court in similar actions against other parties, as well as by the parol evidence of four witnesses; and under these circumstances, the claim was awarded to the extent of 8 annas and 8 pies, being the first and third items of the account. Whereat, feeling aggrieved, the defendant appealed in the Court of the Senior Assistant Judge at the detached station of Rutnagherry, who reversed the decision on the following grounds :—

"The plaintiff, who represents himself to be a *mokudum*, but receives no allowances from Government, produces two decrees obtained by his father in 1822, but they have nothing to do with defendant in this case, as he was neither plaintiff, nor defendant, in the suits in which they were passed; and the *sunud* No. 40, which the plaintiff has entered, does not mention the

1850
23rd January.

*wutun* in dispute. The Court, to ascertain how far the *man*, or rights, which the plaintiff claims are in accordance with Mahomedan law, put a question to that effect to the *Moulvee* of the Court in a former suit, No. 53, and a copy of his answer, No. 10, is recorded, setting forth that there is no such *wutun* allowed by that law; and that no one has any authority to grant a *sunud* in such a case, it being at the option of parties situated like the defendant to call the plaintiff, or not, on the festive occasions alluded to."

A further appeal from this latter decision was then entered in the Court of the Zillah Judge of the Konkun, in which it had to be struck off the file, conformably to the Interpretation of the 12th September 1846, in Act III. of 1843, whereupon a special appeal

W. Simson, Esq.

was admitted in the Sudder Dewanee Adawlut, on the ground that the decision of the Senior Assistant Judge was contrary to established usage, it being the opinion of the single Judge who granted the certificate to that effect that the matter was a dispute regarding *manpan*, and should not be governed by express law, but by the established customs of the country.

After the case had been postponed, to allow the *Vukeels* of the parties to produce precedents for, and against the claim, it was called on before the single

John Warden, Esq.

Judge, who recorded the following minute in sending the matter before a full Court:—

"The *Vukeel* of the appellant points to exhibits numbered 41 and 42 (documents on which the Moonsiff relied), and to exhibits 18, 22, and 24* of case

* These were a *sunud*, a decree, and a report from the *Moulvee* of the Rutnagherry Adawlut produced in evidence in the case alluded to, in which plaintiff was the same, and the decision also the same as in the present case.

1850
23rd January.

No. 2470, in support of his side of the question, that by the established usage of the country, the recognized Musulman *mokudum* of a village is entitled to the *manpan* claimed; and that such was granted to appellant's family by the late Government of the Peishwa, through the Soobédar of the district in which the question arose, after consultation with, and by consent of, the parties from whom the *manpan* is claimed. The vukeel of respondent points to exhibit 46 (a decree passed in the Assistant Judge's Court) in support of his view of the question. The Kazee of the Court, himself a *Patel*, and from his position, otherwise a person who must be more or less acquainted with the usage of the country on a point of the nature of that before the Court, states as the result of his experience that Musulman *mokudums* enjoy *manpan* as claimed, and that the observing of such is not optional with those from whom this distinction is now demanded.

"On a review of this case it appears that the *manpan* claimed is not a new demand without any sanction from usage; but, although it was resisted formerly as well as at present, that an accommodation was effected many years ago, viz. in A. D. 1809, by which the *manpan* claimed was to be conceded to the *mokudum* or *chougula** who represented at that time the present appellant; and that the enjoyment of this distinction was afterwards, in A. D. 1822, formally granted by decree of Court. Under these circumstances the sitting Judge is not prepared to confirm the decision of the lower Court in this case, which is therefore referred to a full Court."

* An hereditary village officer, the *Patel's* assistant; also the head man of certain castes.

1850
23rd January.

Messrs. A. Bell, John Warden, P. W. LeGeyt.

Decision was then pronounced in the matter as follows, by a full Court :—

"The Court is of opinion that the principle laid down by the Sudder Dewanee Adawlut in case No. 42, page 174 of the printed reports of decisions,* viz. that the performance of certain ceremonies is optional; but if performed by the persons who by right perform them, must be paid for, is applicable to this case. It appears that the respondent was not compelled by any law to perform the ceremonies for which the *manpan* is claimed by the appellant, as the constituted dispenser of such ceremonies; and on the occasion in question, the respondent did not require the performance of these ceremonies, and it follows that appellant is not entitled to any fee or honor which would arise from such performance; not because the *manpan* is not sanctioned by Mahomedan law, but because the performance of the ceremony being optional, he was not called upon to perform it. Under this view this appeal is dismissed with costs."

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NOTE.—Special Appeals Nos. 2456, 2462, 2469, and 2470, in which the plaintiff brought similar actions against other parties, were decided in the same way.

* See Collection printed in 1843.

No. 2215, Appeal.

GREGOR GRANT, Esquire, Collector of Land Revenue ..... *Appellant,*

*versus*

HUMABAEE, Widow of MERWANJEE HEERJEEBHOY..... *Respondent.*

*Rupees* 1,260.

[A claim to exemption from the payment of the *abkaree** tax on an estate in Bombay was rejected, on the grounds that such a tax was distinct from a tax on the land, and that exemption could not be claimed under the terms of the grant under which the estate was held.]

1849
13th April.

The respondent, Humabaee, Parsee widow, sued the Collector of Land Revenue of Bombay, in the Court of the Revenue Judge of the island of Bombay, for exemption from the payment of tax on certain date and brab trees growing on her land near Parel, in the island of Bombay.

The plaint† set forth—1st, that the land in question was part of an estate granted in 1795 to the plaintiff's family in consideration of services rendered to the state; 2nd, that in course of time the estate became divided and held in severalty, the portion of it which was the subject of dispute falling to the share of plaintiff; 3rd, that in 1830 the several proprietors of the estate petitioned the Government of Bombay for a total exemption from all taxation, in reply to which

* Revenue derived from spirituous liquors; excise generally.

† See Note A.

1849
13th April.

it was signified by the Secretary to Government in the Revenue Department in 1831* that the Collector of Bombay had been authorized to "exempt from tax the land and its produce," by which the plaintiff was encouraged to plant 3,461 date trees between the years 1830 and 1840; 4th, that from the date of the said Government letter no tax was levied until 1840, when the tax on date and brab trees was re-imposed, which was altogether unwarrantable and illegal—first, because the grant was an absolute *inam* grant, not subject to any tax or impost; secondly, because the subsequent exemption granted by Government was absolute and irrevocable; and thirdly, because, if even the exemption admitted of being revoked, no revocation could affect the trees planted subsequently to 1830.

The plaintiff also produced in support of her claim a pamphlet,† in which her family had printed all their papers (including memorials to the Home and Local Governments, and orders thereon,) relating to the privilege in dispute.

* The following is a copy of the Government letter on the subject:—

No. 1192 of 1831.

TERRITORIAL DEPARTMENT, REVENUE.

To NOWROJEE JÁMSETJEE, and others.

In reply to your letter dated the 8th instant, I am directed by the Right Hon'ble the Governor in Council to acquaint you that the Collector of Bombay has been authorized to exempt from tax the land and its produce granted to the Lowjee family.

By order of the Right Hon'ble the Governor in Council,

(Signed) T. WILLIAMSON, Secretary to Government.

*Bombay Castle, 28th March* 1831.

† See Note B.

1849
13th April.

In the answer put in by the defendant, he admitted, for the purposes of the suit, the different allegations of the plaintiff, but he denied, that the grant was an *inam* not subject to any future tax or impost; on the contrary, he argued, it was seen that the tax leviable on date and brab trees was paid and acquiesced in by the plaintiff and those who preceded her, for several years previously to its remission by the Government of Bombay; and he further observed that if the claim to exemption, on the ground that the grant was an *inam*, was just, the plaintiff would be entitled to recover all sums paid as *abkaree* prior to 1831. He also denied that the exemption by Government in 1831 was absolute and irrevocable, contending that it was at any time in the power of Government to withdraw the privilege, and that it had been withdrawn in obedience to the orders of the Hon'ble the Court of Directors. The defendant also put in extracts from two Despatches from the Hon'ble the Court of Directors,† showing that the privilege claimed had been refused.

The case was tried by the Revenue Judge of Bombay, P. W. LeGeyt, Esquire, who decided that the plaintiff had established a limitation of the right of Government to assess the land which had come into her possession, under the Certificate of the Government of Bombay, dated the 29th December 1783, which certificate was formally ratified and confirmed by the Hon'ble the Court of Directors on the 8th April 1795; this limitation, he held, was contained in the letter of Mr. Secretary Williamson, No. 1192, of the 28th March 1831, that letter being in his opinion

* See Note C. † See Note D.

1849
13th April.

of the nature of the "deed or other writing" declared in Clause 1st, Section XXXV. Regulation XVII. of 1827, to be a "sufficient exemption" from payment of public revenue; and he further held that this exemption did not come under the exception laid down in Clause 4th of the said Section XXXV. of Regulation XVII. of 1827. Judgment was accordingly recorded for the plaintiff.

The defendant then appealed* in the Sudder Dewanee Adawlut, and after iterating his former arguments that the grant was not *inam*, and that the tax had been re-imposed by order of the Hon'ble the Court of Directors, on the ground that the exemption allowed by the Bombay Government was never contemplated, and had been conceded under a misconstruction of the original assignment, he proceeded to state that the Regulation under which the Revenue Judge had decided the case, applied to the Mofussil, and not to the island of Bombay; and that by no process of reasoning could the Government letter of 1831 be tortured into "a writing" coming within the meaning of the Clause and Section of the law quoted; but even admitting, he proceeded to observe, that it could, Clause 4th of the same Section expressly provides that such writing should not be considered sufficient title to exemption from assessment, "in so far as the exemption has been wholly or partially annulled by an order issued by the present or any former Government," the exemption under authority of that letter having been expressly annulled by the Bombay Government of 1839, by order of the Court of Directors.

* See Note E.

1849
13th April.

In a supplementary petition* the defendant further set forth—first, that the decision of the Revenue Judge virtually admitted that the plaintiff had no claim to exemption under the documents conferring the grant; secondly, that Mr. Secretary Williamson's letter did not recognize any pre-existing right of the kind, nor give any pledge that the tax would not be re-imposed, and therefore it could not be considered a deed or writing within the meaning of Section XXXV. of Regulation XVII. of 1827; thirdly, that the order of Government to re-impose the tax was occasioned by a despatch from the Hon'ble the Court of Directors, who disapproved of the exemption, and who were entitled to be the expositors of the extent of their own bounty; and fourthly, that Regulation X. of 1833, in the same manner as Regulation XXI. of 1827, was framed for the good order and Civil Government of the Presidency, the *abkaree* tax levied under it being wholly distinct from the rent levied under Regulation XVII. of 1827 by Government, as lords of the soil, its provisions extending to all brab and date trees grown in any part of the island, whether in alienated or *sukaree* land; and which, as a formal enactment could only be set aside by another enactment, and not by a letter such as Mr. Secretary Williamson's, by which Government merely abstained for a time from enforcing the law, which law having been again put in force, it was not competent to any Court to declare it suspended.

These arguments were met in an answer† put in by the original plaintiff, and the case then going before

* See Note F. † See Note G.

1849
13th April.

A. Bell, Esq.

the sitting Judge he recorded his opinion that the construction placed by the Revenue Judge on Mr. Secretary Williamson's letter, (No. 1192 of 1831,) dated the 28th March 1831, was erroneous, the grant being expressly subject to the approval of the Hon'ble the Court of Directors, and the exemption also requiring the Court's ratification before the grant could be held to be complete: and as no sufficient title to exemption in the absence of the required approval and ratification had appeared to him to have been established, he referred the case for trial to a full Court, when judgment was pronounced as follows:—

Messrs. A. Bell, B. Hutt, John Warden.

"The words of the grant are that the grantees have been 'put in possession' of certain batty ground with its proportion of 'attached waste until the pleasure of the Hon'ble the Court of Directors is known,' which pleasure was expressed in the words 'we hereby ratify and confirm the said grant with a due proportion of *foras* and *pertenças* to their family and descendants.'

"The plaintiff calls this grant an absolute *inam*, not subject to any future tax; but her family, in the memorial referred to by the defendant, acknowledges that when the fees on the brab and date trees were established, this ground became subjected to such payment, so that there was the most perfect understanding at the time between grantor and grantees that they were liable to pay this tax. It does not appear from the pleadings in what year the tax called *abkaree* was introduced, but the Counsel for the plaintiff states it to have been in 1798, or fifteen years only after her family were put in possession of the estate, and three years only after that possession was ratified

1849
13th April.

by the Court of Directors, which, in the absence of any specification on the point, is a very satisfactory interpretation of the nature of the grant, according to the understanding of the original parties to it. The plaintiff's family in a subsequent memorial argue, that if a grantor mean to reserve any portion of the thing granted, it is his duty to insert such reservation; but whatever may be the rule of English law, there is no rule for the interpretation of grants by Governments in India better understood than this, that that which is not expressly conceded is withheld; that if a grant is not expressly called an *inam* it is not an *inam*; if it do not state that a grant is hereditary from generation to generation, it is resumable at the decease of the grantee. Here simple 'possession' only was granted; moreover, two grants in Bombay of a nature precisely similar to this are referred to in the pleadings in which the *abkaree* tax is expressly conceded, which would have been unnecessary if the grant of mere possession carried that concession with it; and the inference is inevitable, that when the grant of the *abkaree* tax is not expressly made, it is withheld.

"It is not using but misusing the produce of the soil which the plaintiff calls improving the estate: she is entitled to plant what she pleases, and use the natural produce as she may think fit; but when she seeks to deteriorate the produce of the soil in order to make the land instrumental to the production of that which by the mere process of fermentation becomes intoxicating a very short time after it is drawn from the tree, she then renders herself liable to the provisions of a law framed to abate drunkenness, as well as to contribute to the revenue applicable to all persons

1819
13th April.

who so misuse the produce of the soil without a license, which license may be withheld, and for which a certain tax is levied; but this is quite distinct from a tax on the land, the distinction being very clearly and correctly stated by the defendant.

"It is true that the Government at one time authorized the Collector to exempt the drawers of toddy from the plaintiff's trees from the payment of the tax; but as the Government, in issuing its authority to exempt the trees from the tax, did not state that it extended the original grant, it must be taken that they only interpreted it. Their order was passed on an inspection of the grant which they wrote to the plaintiff to send them, and which it may be admitted they then considered such as to justify their issuing the order they did; but had they intended to make a new grant they would have done so in express terms, as in the other two instances of exemption referred to; and as the original grant was made subject to the pleasure of the Court of Directors, it is fair to presume that any extension of it would have been likewise made subject to the same. The Court considers, therefore, that the Government only interpreted the original grant; and if the grant was no grant till made so by the Court of Directors, they were entitled, under the universally admitted rule for the interpretation of Indian grants already referred to, to determine (the grant being silent on the point) what it was they did confirm, and whether the interpretation of their act was or was not correct.

"They said it was incorrect, and thereon the Government withdrew the authority to exempt from the tax which they had issued, and which, whether it

1849
13th April.

would or would not have been just to exercise it, they had the power to do, even if such exemption had been made the subject of a formal grant to the plaintiff; much more when they simply authorized their Revenue Officer to grant an exemption, without stating how long such authority should be vested in him.

"The Court further considers that the Section of the Regulation on which the Revenue Judge decided is inapplicable, and, were it otherwise, the letter of the 28th March 1831 is not a writing of the character that has been given to it; and for the above grounds the decree of the Revenue Judge is hereby reversed."

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NOTE A.—PLAINT.

That in the year One thousand Seven hundred and Eighty-three, the Government of Bombay granted to Manockjee Lowjee and Bomanjee Lowjee, Master Builders in the Dockyard in Bombay, for the eminent services which they had rendered to the Government, an estate in the island of Bombay, in *inam*, as appears by the following certificate under the hand of the Honorable the Governor in Council of Bombay, dated the twenty-ninth day of December, One thousand Seven hundred and Eighty-three :—

"This is to certify that Vice Admiral Sir Edward Hughes, K.B., and Commander in Chief of His Majesty's ships and vessels in the East Indies, having by letter, under date the Tenth day of March, One thousand Seven hundred and Eighty-three, pointed out the great services rendered the nation at large, and the United East India Company by Manockjee Lowjee and Bomanjee Lowjee, the two Master Builders at the Presidency, and having strongly recommended to us to confer on them a certain portion of ground on this island, which will yield annually forty *morahs* of *toca batty*, this is to certify that the said Manockjee Lowjee and Bomanjee Lowjee have accordingly been put in possession of certain *batty* grounds in the District of Parell, with their *foras* and *pertenças* of the side grounds, which will yield the above quantity of *toca batty*; and that they are to be

kept in possession of the same without molestation until the pleasure of the Honorable the Court of Directors is known."

That the Honorable the Court of Directors confirmed the said grant, by a letter bearing date the Twenty-eighth day of April, One thousand Seven hundred and Ninety-five, in the following words:—

"*Para.* 10.—We have considered of the memorial you have transmitted to us from sundry inhabitants of Parell and Mahim, appealing from a decision of your Board on their former petition, complaining of encroachments upon their property by the Lowjee Wadia family, who are in possession of a spot, which, it appears from the papers before us, that for time immemorial the cultivators of *toca* or *batty* ground have been allowed a certain portion of waste land, called *foras*, at a very trifling rent, for the food of cattle, and other purposes necessary to the cultivation; and that the *foras* land, said to be improperly possessed by the Lowjee family, is that which was attached to the *batty* land acceded to them in One thousand Seven hundred and Eighty-three, and is in proportion to the whole quantity allotted to the villages before mentioned; and as the memorialists are not found in their assertion that *foras* land made no part of the original grant, we are of opinion that they have no just cause of complaint against the Lowjee family on that account.

"11.—As it is apparent from the Report of the Collector upon this subject, of the 4th July 1793, that both the *toca* or *batty* land and the *foras* land are the undoubted property of the Company, that the latter is held as an indulgent, though necessary appendage by those who cultivate the former, and that no one will cultivate the *toca* without the proportion of *foras* land being attached to it, we are much surprised that the holders of the *foras* land under such a tenure should have been tacitly permitted to dispose of the same as though it had actually been their own property, and we rely upon your vigilance for preventing any such improper alienation in future, and for taking care that the successive occupiers of the *toca* land be permitted to enjoy their due proportion of the *foras* agreeably to ancient usage.

"12.—Observing by your advices of 30th September 1783 and 10th February 1784, that you were induced to issue the before mentioned grant to the two Master Builders and their sons at the earnest recommendation of the late Sir Edward Hughes, as a reward for the essential and important services they had rendered the nation, and the Company in particular, in refitting His Majesty's Squadron, and

as we ourselves have borne frequent testimony of their merits, we hereby ratify and confirm the said grant, with a due proportion of *foras* and *pertenças*, to their family and descendants."

That the said Manockjee Lowjee and his brother were accordingly let into possession of the said estate, and the same was enjoyed by themselves and their descendants after their decease as an undivided estate, until the year One thousand Eight hundred and Twenty-three, when a written agreement was entered into and signed by all the parties then interested in the estate to partition the same, and by virtue thereof the said Merwanjee Heerjeebhoy, as the only son of Heerjee Manockjee, who was one of the sons of the said Manockjee Lowjee, became entitled to a garden and field adjoining each other, near the Mahim Road, and a hill called Golunghees, in the village of Parell, being part of the said *inam* estate, as his the said Merwanjee Heerjee's share thereof.

That the said Merwanjee Heerjee died in the year One thousand Eight hundred and Twenty-seven, having left a will, and thereby bequeathed the said garden, field, and hill to his four sons, Dossabhoy Merwanjee and others, and directed the complainant to manage the same until his property was divided amongst his said sons, and appointed the complainant the executrix of his said will, who duly obtained probate thereof from the Supreme Court of Judicature at Bombay.

That in the year One thousand Eight hundred and Thirty-one, the said *inam* estate was divided in accordance with the said agreement, and the complainant has since then been in the separate and exclusive possession of the said garden, field, and hill, as the separate share of the said Merwanjee Heerjeebhoy in the said estate.

That heavy demands having been made upon the said *inam* estate for taxes on drawing toddy from the brab and date trees growing thereon, the said Dossabhoy Merwanjee, on behalf of the said complainant and the other sharers in the said *inam* estate, jointly applied to the Right Hon'ble the Governor of Bombay in Council on the Twenty-seventh November, One thousand Eight hundred and Thirty, to order the total exemption of the said estate therefrom, to which Mr. Secretary Williamson communicated the reply of the Right Hon'ble the Governor in Council on the Twenty-eighth day of March, One thousand Eight hundred and Thirty-one, in a letter in these words :—" I am directed by the Right Hon'ble the Governor in Council to acquaint you that the Collector of Bom-

bay has been authorized to exempt from the tax the land and its produce granted to the Lowjee family."

That in pursuance of this order from Government, the said garden, and field and hill, being that part of the said estate in the occupation of your petitioner, were exempted from the said tax, and the collector ceased to levy the same on drawing toddy from the brab and date trees growing on the said premises, until the year One thousand Eight hundred and Forty, when the Collector signified to your petitioner and the several other owners of the said estate that the said tax would be re-imposed.

That the complainant, in consequence of the said garden, and field and hill being so exempted by Government from the said tax as aforesaid, was encouraged to plant, and placing the fullest reliance on that exemption, did in fact plant, between the years One thousand Eight hundred and Thirty, and One thousand Eight hundred and Forty, in the said garden and field, and on the said hill, three thousand four hundred and seventy-one date trees, which, with one hundred and sixty-one date trees, and twenty brab trees planted previous to the year One thousand Eight hundred and Thirty, constitute the whole of the trees now growing on the estate.

That the Collector of Land Revenue has lately demanded from the complainant a tax of three rupees per annum on each brab tree, and the sum of half a rupee per annum on each date tree, from which toddy is drawn, as well on those planted before as on those planted since the year One thousand Eight hundred and Thirty, which tax at present amounts to the sum of rupees one hundred and twenty-six annually.

The complainant, however, shows and submits that this demand of the Collector is altogether unwarrantable and illegal; and that his right to impose the said tax is extinguished on these grounds:—

*Firstly*,—That the original grant of the estate in reward for public services, without reservation, was an absolute *inam* grant, and not subject to any future tax or impost; and that the tax claimed by the Collector being imposed on drawing toddy, not merely for the purpose of distillation, but for any purpose whatsoever, is a tax on the growing produce of the land, and therefore on the land itself, not distinguishable from the ordinary land revenue, from which it is admitted the land of your petitioner is exempt.

*Secondly*,—That the exemption granted by Government, as before mentioned, was absolute and irrevocable.

*Thirdly*,—That even if the exemption admitted of being revoked, no revocation could affect the trees planted subsequent to the year One thousand Eight hundred and Thirty, on the faith of such exemption.

Your petitioner therefore humbly prays that all trees planted in the said garden and field, and on the said hill as part of the said estate, may be exempted from the tax or revenue of three rupees on each brab tree, and a half a rupee on each date tree demanded by the Collector of Land Revenue, and that the said Collector may be restrained from proceeding to enforce payment thereof, on your petitioner giving security in accordance with the provisions of the Regulation in that behalf provided.

## NOTE B.

The principal contents of the pamphlet put in by the plaintiff were a memorial from the Lowjee family to the Bombay Government, dated 27th November 1830, together with correspondence relating thereto, on the subject of the total exemption of the estate from tax, among which correspondence was the letter from Mr. Secretary Williamson, of the 28th March 1831, authorizing the exemption of the land and its produce from tax; a memorial to the Hon'ble Sir James Carnac, dated the 30th December 1839, against the levy of the *abkaree* tax on the date and brab trees on the estate as proposed in a representation from the Collector of Bombay; and a memorial to the Hon'ble the Court of Directors, dated the 25th January 1840, praying that the revocation of the exemption which the Lowjee family had enjoyed from payment of the *abkaree* under the letter of Government, dated the 28th March 1831, might not be sanctioned, appended to which were copies of testimonials in favour of the family.

## NOTE C.—Answer to Plaint.

The Collector admits that the Government of Bombay, in the year 1783, put Manockjee Lowjee and Bomanjee Lowjee, Under Builders in the Dockyard of Bombay, in possession of a piece of ground in the Island of Bombay, until the pleasure of the Hon'ble Court of Directors should be known; and that on that occasion the Hon'ble the Governor in Council of Bombay gave to the said Manockjee Lowjee and Bomanjee Lowjee the certificate dated the 29th day of December 1783, set out in the said plaint; but the Col-

lector denies that such certificate amounted to a grant in *inam* of the land therein referred to, or that the Government of Bombay ever made any such grant thereof.

The Collector admits that the Hon'ble Court of Directors addressed a Despatch to the Government of Bombay, bearing date the 28th day of April 1794, of which the 10th, 11th, and 12th paras. were in the words or to the effect set out in the plaint.

The Collector saith that he knows nothing about the agreement of partition in the plaint stated to have been made by the descendants of the two Builders Manockjee Lowjee and his brother, in the year 1823, or whether by virtue thereof Merwanjee Heerjeebhoy became entitled to the garden and field adjoining each other near the Mahim Road, and the hill called Golunghees, in the village of Parell mentioned; but the Collector admits such last-mentioned facts for the purposes of this suit; and that the said garden, field, and hill are part of the land put into the possession of the said two Builders in 1783 as aforesaid; and that the said complainant is now in the separate possession thereof as the widow of Merwanjee Heerjeebhoy for his share in the said estate.

The Collector admits that Dossabhoy Merwanjee did make an application to the Right Hon'ble the Governor in Council of Bombay, dated the 27th of November 1830, to the effect in the plaint mentioned, but the Collector begs to refer to the petition or memorial presented on that occasion; and the Collector also admits that Mr. Secretary Williamson addressed a letter on the 28th of March 1831 to Nowrojee Jamsetjee and others, in the words or to the effect set out in the plaint. The Collector admits, that in pursuance of the order of Government the said garden, and field and hill, being that part of the said estate in the occupation of the complainant, were exempted from the *abkaree* tax, and the Collector ceased to levy the same on drawing toddy from the brab and date trees growing on the said premises until the year 1840, when the Collector signified to the complainant and the several other owners of the said estate that the tax would be re-imposed.

The Collector admits that he has lately demanded from the complainant a tax of three rupees per annum on each brab tree, and the sum of half a rupee per annum on each date tree, from which toddy is drawn, as well on those planted before as on those planted since the year 1830.

The Collector denies that such demand is illegal, for he denies that the original grant was an absolute *inam* grant, and not subject to

any future tax or impost; and on the contrary, the Collector shows that the tax leviable on date and brab trees on other estates in the island was paid and acquiesced in by the complainant, and those under whom she claims, in respect of the trees planted on the premises in question, for several years previously to the same being remitted by the Government of Bombay on the application of Dossabhoy Merwanjee; and that it is not open to the complainant now to question the legality of such payments, whereas her claim to enjoy the said premises exempt from taxation on the ground of the original grant being a grant in *inam*, of an estate free from any tax or impost whatsoever would, if just, entitle her to recover back all sums paid by her, and those under whom she claims for *abkaree* prior to the year 1831.

The Collector also denies that the exemption ordered by Government in the year 1831 was absolute and irrevocable; and on the contrary, the Collector contends that it was at any time in the power of Govermment to withdraw the privilege thereby conferred; and that the same has now been withdrawn in obedience to the orders of the Hon'ble Court of Directors.

## NOTE D.—Extracts from Court's Despatches.

*Extract of a letter from the Hon'ble the Court of Directors, dated 2nd December* 1840.

Revenue Department.

No. 11 of 1840.

*Our Governor in Council at Bombay.*

1. With these letters you transmit for our decision a question which has arisen relative to the liability to the *abkaree* tax of certain landed property in the island of Bombay, which was granted to the Lowjee family as a reward for public services in the year 1783.

Letter dated 28th December 1839 (No. 66).
Letter dated 29th January 1840 (No. 6).
Letter dated 31st March 1840 (No. 16).

2. The *abkaree* tax was levied on the land comprised in this grant up to the year 1831, when, in consequence of a representation from the family and a report favourable to their claims by Mr. Doveton, the Collector, orders were issued to exempt from tax the land "and its produce granted to the Lowjee family." Under these orders, the collection of the *abkaree* was from that time discontinued.

3. In a letter dated 5th November 1839, Mr. Bruce, the present Collector, brought to your notice the serious consequences to the *abkaree* revenue of the island which would result from a continuance

of the exemption enjoyed by the Lowjee family, and argued that neither from the terms of the original deed of grant nor from our confirmation of it in April 1795, could the right which was inadvertently admitted by the Government in 1831 be maintained. He accordingly suggested, that, if it should be deemed unadvisable altogether to rescind the order of 1831, it should at least be declared applicable only to the trees in existence at that date, and that all subsequently planted should be held liable to the tax.

4. We have given this case our full consideration, and we are clearly of opinion that the original grant neither gave, nor was intended to give, any claim to the enjoyment of the *abkaree* tax leviable on the produce of the trees growing within the limits of the estate; of this, indeed, there appears to be no doubt either on your minds or on that of your Advocate General. The admission, which was incautiously made by the Government in 1831, cannot add any weight to the claim of the grantees, for it was not only made on premises altogether erroneous, arising from the reprehensibly careless manner in which the case was investigated and reported by Mr. Doveton, at that period Collector of Bombay, but it was altogether invalid from not having received our sanction; which, had the case been reported to us at the time, would most certainly have been refused.

5. You are well aware of our insuperable objection to the alienation of this branch of the revenue; with every desire to do justice to the claims of the Lowjee family, whose public services we have frequently had occasion to acknowledge, we cannot permit them to retain a privilege which they only acquired through an error of a former Government, which in granting it, widely exceeded its authority, and we do not consider that they are entitled to any compensation for its withdrawal; but we do not wish that they should be called on to account for the mesne profits, which you will allow them to retain without inquiry.

6. You will understand, that these instructions relate exclusively to the *abkaree*. If the trees on the island of Bombay are liable to any impost strictly in the nature of a land-tax (a point which is not distinctly stated), we think that those on the estate of the Lowjee family should be exempted from it, as it appears to us to have been the original intention of the Government that the family should hold the estate free from any demand on account of land revenue.

7. You will communicate this decision to the Lowjee family, in reply to their memorial.

REVENUE DEPARTMENT.
No. 26 OF 1842.
*Our Governor in Council at Bombay.*

With your letter dated the 15th June last, No. 31, you have transmitted a further memorial from the members of the Lowjee family, praying for a reconsideration of our decision on their former memorial, by which we rejected their claim to the produce of the *abkaree* tax leviable on their estate in the island of Bombay.

2. All the circumstances of their case were fully considered by us when our Despatch of the 2nd December 1840, in which our decision was communicated to you, was prepared, and we see no reason to alter the views therein expressed. We may observe that the cases of Merwanjee Rustomjee and Framjee Cowasjee, (of whom the former received compensation for the surrender of the *abkaree* of his estate, and the latter continues to enjoy it,) to which reference is made by the memorialists, differ essentially from their case, inasmuch as by the grants to those parties the *abkaree* was especially conveyed, whereas the resolution of the Bombay Government in 1831, under which the *abkaree* was for ten years collected and enjoyed by the Lowjee family, did not profess to enlarge the terms of the original grant of 1783, but only to interpret them, and in so doing the Government adopted a construction which, in our opinion, as well as in that of the succeeding Government, was not warranted either by the terms or the intention of the grant.

3. For these reasons, and for others which are fully set forth in our Despatch before referred to, we must decline to accede to the request of the memorialists for a renewed permission to collect the *abkaree* tax on their estate, or to be granted compensation for its withdrawal.

## NOTE E.—PETITION OF APPEAL.

The plaintiff brought an action in this case for Rs. 1,260, to be relieved from an assessment made by defendant on certain date and brab trees growing on her land, situated near Parell, on the island of Bombay, being part of an estate which in the year 1783 was, with the sanction of the Hon'ble the Court of Directors, put into the possession of the two Master Builders of Bombay, by the then Government of that Presidency, as a reward for good services performed by them to the State, and the taxes on which, and on its

produce, were in 1830 remitted by the Governor in Council of Bombay.

The defendant having admitted, for the purposes of the suit, the different allegations of the plaintiff, in regard to the title and possession of the land, and also his having demanded payment of the tax complained against, contended that such demand was legal, on the grounds that the original assignment was not an absolute or *inam* grant, exempt from all taxes, existing or future; that the very tax complained of had been levied, and willingly paid, for several years after the assignment of the land; and that its remission by the Bombay Government in 1831 was a mere indulgence, which the Collector was authorized to admit, but which could be withheld at any time at the pleasure of Government, and had been withdrawn in 1839 by order of the Hon'ble Court of Directors, who refused to confirm or continue it, on the ground that it formed no part of the intention of the original assignment by them, and had been allowed by the Bombay Government under a construction of that assignment most palpably erroneous. The tax was accordingly reimposed in 1840, hence the present action.

Whereupon the Court, holding that the authority granted by the Government to its officer in 1831, not to levy the tax, is limitation of the right of Government to assess the land in question: the letter conveying to the Collector such authority being in the opinion of the Court, of the nature of a deed or writing declared in Clause 1st Section XXXV. of Regulation XVII. of 1827 to be a sufficient title to exemption from payment of public revenue, and such exemption not coming, in the opinion of the Court, under the exemption laid down in Clause 4th of the said Section XXXV. of Regulation XVII. of 1827 recorded a verdict for the plaintiff, with costs.

Defendant, dissatisfied with the above decision, presents this petition of appeals to the Court of Sudder Dewanee Adawlut to have it set aside, on the following grounds:—

The original assignment did not contemplate exemption from taxation of the land assigned, or of its produce. The taxation now complained against was cheerfully paid up to the year 1830 or 1831, subsequent to the assignment. Its remission was then solicited by a humble appeal to the generosity of Government to remit it for the future.

The instructions issued to the Collector in 1831, not to levy the tax, arising out of a construction by the Bombay Government of the

Hon'ble Court's instructions, palpably erroneous, were not a recognition of any legal title to the exemption, the assignees not having even asserted such, and did not in any way pledge the Government not to re-impose the tax, if so directed by the Hon'ble Court, or at their own discretion. The remission being based on the construction of an order of the Hon'ble Court's, was necessarily invalid until it had received the Court's confirmation; for it is preposterous to say that the Court was to have no voice in the interpretation of its own bounty, or that it was bound by the acts of its servants, involving an addition to an extent of some five or six hundred-fold of the advantages contemplated in the original assignment, which was made expressly subject to their approval.

Besides, the Regulation under the provisions of which the Revenue Judge has decided the suit is not applicable to the Presidency, and could not be called in aid to determine the right of Government to assess in the island of Bombay, and if it could, Mr. Secretary Williamson's letter, communicating to the Collector the authority of the Hon'ble the Governor in Council to remit the levy of the tax, was simply an intimation to its own officer, that Government was pleased to grant a certain indulgence; but for no specific period, and cannot by any process of reasoning be tortured into a "writing" coming within the meaning of Clause 1st, Section XXXV. of Regulation XVII. of 1827; and even admitting that it could be so considered, Clause 4th of the same Section expressly provides that such writing should not be considered a sufficient title (to exemption from assessment), in so far as the exemption had been wholly or partially annulled by an order issued by the present or any former Government. Now the exemption admitted under the authority of Mr. Secretary Williamson's letter has been expressly annulled by the Bombay Government of 1839, by order of the Hon'ble Court.

On these grounds, and those set forth in the original defence, the prayer of this petition is, that the judgment passed by the Revenue Judge, under date the 24th of August 1844, be set aside, and a verdict of nonsuit with costs in both Courts recorded against the original plaintiff.

Appellant reserves to himself the right of filing a supplementary petition.

NOTE F.—SUPPLEMENTARY PETITION.

The defendant, the Collector, having in his former petition of appeal reserved to himself the right of filing a supplemental petition pursuant to the Regulation, now craves leave to submit more at length the grounds on which he is dissatisfied with the said decree.

The decision virtually admits that the plaintiff had no title to exemption from assessment under the documents making over and confirming the land to the two Builders, and by virtue of which they had held the land and paid the *abkaree* up to the date of Mr. Secretary Williamson's letter of the 28th day of March 1831.

Now Mr. Secretary Williamson's letter simply informed the members of the Lowjee family that the Collector had been authorized to exempt the land and its produce from taxation: the letter did not recognize any pre-existing right in those persons to the exemption, nor did it grant any exemption, nor pledge Government in any way not to re-impose the tax the following year or at pleasure, and that it cannot therefore be considered "a deed or writing *granted* by the present Government," within the meaning of Section XXXV. of Regulation XVII. of 1827, even if that Section be applicable to the Presidency, but which it is submitted it is not.

But, however, as the Judge resorted to Section XXXV. Clause 1st of the Regulation of a "limitation of the right of Government to assess the land," he was bound by Clause 4th of the same Section, in which it is distinctly written that what is made a title to exemption in Clause 1st of the Section shall "not be considered a sufficient title, in so far as the exemption has been wholly or partially annulled by an order issued by the present Government" and the tax in question, and of which the plaintiff seeks to be relieved, having been imposed under an order of Government to the Collector to discontinue the exemption authorized in the Secretary Williamson's letter of the 28th March 1831, that letter was clearly annulled in the manner pointed out in Clause 4th, and ceased to have any virtue as a conferring title to exemption.

Moreover, the order to Government to re-impose the tax was occasioned by a Despatch of the Hon'ble Court of Directors, disapproving of what the Bombay Government had done in March 1831; and the grant of the land to the Lowjee family having in fact emanated from the Hon'ble Court, it is clear that that Court was entitled to have a voice in the construction of its own bounty.

But the Collector contends that the law cited by the Judge in his decision was quite inapplicable to the question raised in this suit; Regulation XVII. of 1827 relates entirely to the assessment of the land revenue in the Mofussil, and by Regulation XIX. of 1827, Section III. Clause 1st, the land revenue of the Presidency is to be assessed according to the principles laid down in certain Clauses of Regulation XVII. of 1827. The above law has reference entirely to the rent levied by Government as lords of the soil, and prevails over only what is known as *Surkaree* or Government land, as distinguished from alienated land. But the tax complained of in the suit is imposed under and by virtue of Regulation X. of 1833, passed by the Hon'ble the Governor in Council in their governing capacity, and applicable to all estates in the island. This Regulation (like Regulation XXI. of 1827, relating to opium and poisonous and intoxicating drugs,) is framed for the good order and Civil Government of the Presidency, and it relates to the brab and date trees grown in any part of the island, whether on alienated land or on *Surkaree* land; and the plaintiff cannot claim any exemption from the *abkaree* duty imposed under it by reason of anything connected with the origin and nature of his title to the land, or by virtue of any Clause of Regulation XVII. of 1827. The Regulation over-rides all grants and *inams*, and as a formal Regulation can only be set aside by a similar Regulation or a legislative Act, it is clear that Mr. Secretary Williamson's letter was, in point of law, inoperative to set it aside. The Government by that letter merely abstained for the time from enforcing the law against the plaintiff, and having now directed the law to be put in force, it is not competent to any Court to declare the Regulation suspended.

## NOTE G.—Answer to Petition of Appeal.

That the facts and circumstances set forth in the original plaint filed in the Court of the Revenue Judge having been admitted by the Collector of Land Revenue, the respondent refers thereto for the true statement of the case upon which the Judge of the Revenue Court came to his decision, but the appellant has set forth the case in an imperfect and erroneous manner.

That the reasons contained in the decree of the Revenue Judge clearly prove the propriety and justice of his determination, in further proof of which many other reasons might be added; but as the ap-

pellant has specified certain objections to the decree, the respondent reserving to herself the right of urging at the trial many reasons in support of the decree, shows that the objections are altogether unfounded.

The original grant of the land being in *inam*, the respondent is entitled to cultivate it in any manner she pleases, and there is no real distinction between cultivating it with grain or with trees, and as it is admitted that the former could not be assessed, neither can the latter be taxed or assessed.

When the trees on the land in question were taxed, the respondent's family appealed to the Government on two grounds, one, that the original grant of the land entitled them to exemption; the other, that if it did not, their services had been such that this exemption should then be granted to them: the order of Government in reply to this appeal expressly exempting the trees was therefore either a recognition of exemption under the former grant, or a new grant of exemption.

It was not necessary that the grant of exemption should be confirmed by the Court of Directors, because the Government of Bombay was authorized by an act of Parliament, and also by the Regulations, to make such a grant, and the amount of profit which may be derived from the grant being uncertain, is of no consequence, for that is always so in every grant of the produce of land; but it is always dependent on, and is at the same time limited by the extent of the land and the capital expended in its cultivation or improvement.

Chapter IX. of Regulation XVII. of 1827 was made for determining what is meant by exemption in the former chapters of that Regulation, and so much of it as is necessary to explain Section III. and IV. of that Regulation must be referred to; but if not, the case of respondent is still stronger, for the Revenue Judge and the Sudder Adawlut must then decide according to right and justice, and the claim of the respondent is clearly right and just: it is not competent to any one, even to the Queen of England, to revoke a grant once made, otherwise no faith could be placed in the Government or in individuals, and there could be no right in or enjoyment of property of which the subject might be at any time deprived. No limitation having been made, or right of revocation having been reserved in the grant, it must be regarded as perpetual and irrevocable, and the respondent, having incurred great expense, and cultivated trees, relying on this grant of exemption, it could not be

retracted without great injustice. But if Chapter IX. is to be applied to this case, then under Section XXXV. the respondent has produced a sufficient document, but under Section XXXVII. the respondent is beyond all doubt entitled to exemption, because her right has been recognized by the Government as required by that Section.

The appellant contends that Clause 4th of Section XXXV. confers the power of re-imposing the revenue; but it is clear that Clause 4th refers to another subject, and is inapplicable, for if it could be applied there would be no Revenue Judge, and no appeal to the Sudder Adawlut as any order of Government or of the Collector to assess would be final and conclusive, and all the other Clauses would be useless and absurd. Clause 2nd of Section II. of Regulation XVII. reserving the power of further assessment to the Government is omitted from the enumeration of the Clauses applicable to the Island of Bombay, which tends to show that the Government has no such right as that claimed by the Collector; and Clause 2nd of Section IV. declares in express terms that a right once conferred must be observed.

The respondent, therefore, and for many other good and sufficient reasons, humbly prays that the decree of the Revenue Judge may be affirmed, with costs.

*Bombay, this 20th day of January* 1845.

# INDEX.


PAGE

ABKAREE.—Revenue derived from spirituous liquors; excise generally..... 147

Rejection of a claim to exemption from the payment of the *abkaree* tax on an estate in Bombay, on the ground that such a tax was distinct from a tax on the land, and that exemption could not be claimed under the terms of the grant under which the estate was held ..... 147

ACTION.—See *Suit.*

ADAWLUT.—It is not the province of the Adawlut to decide a religious matter..... 139

ADJUDICATION.—A matter already adjudicated in a suit cannot be re-adjudicated..... 132

ADOPTION.—The authority of a husband is not essential to the validity of the adoption of a son by a widow of the Nagur Brahmin caste..... 1

AGENT.—A younger brother, as agent or manager, is competent to mortgage family property in the absence of his elder brother; and even if no partition has taken place, he can still mortgage his brother's share..... 24

ALIENATION.—See *Property.*

ALLOWANCES.—Held that a claim to a *wurshasun* allowance was barred under the Statute of Limitations, because it was brought eleven years after it was due, and because the plaintiff held no written acknowledgment..... 11

ASSETS.—Responsibility for the debts of a deceased person of the party who takes his..... 126

APPEAL.—A certificate of special appeal should be precise in stating the matter certified for inquiry ..... 15

APPEARANCE.—A suit having been struck off the file for non-appearance, it was held that the plaintiff was entitled to bring a new action..... 99

ATTACHMENTS.—Nature of the engagement to be entered into under Section LXVII. of Regulation IV. of 1827, by a party desiring to stay a sale in execution of a decree..... 113

In suits to raise attachments, the *onus probandi* rests on the defendant if the opposite party is in possession ..... 121

BANKRUPTCY.—A creditor of an insolvent firm is not bound by an arrangement for the settlement of its debts to which he did not agree, and may claim debts due to it..... 128

PAGE

BATAGAUM.—Claim to a *wurshasun* allowance payable from the revenues of the village of ..... 11

BHAEEBUND.—See *Brothers, Property.*

BONDS.—It is unnecessary to sue on a stamp that will cover the whole amount of an instalment bond, in seeking to recover such instalment or instalments as may be due at the time of suing ..... 37

The instalments which may be overdue on a bond may be sued for separately .. 79

In a suit on a bond for which it had not been shown that full consideration had been given, it was held that the claim to the extent admitted by the defendant was not barred ..... 124

BROTHERS.—A younger brother, as agent or manager, is competent to mortgage family property in the absence of his elder brother; and even if no partition has taken place, he can still mortgage his brother's share ..... 24

When two brothers live apart, but are undivided in interest, a sale of a portion of the family property by one of them, without the consent of the other, is null and void by Hindu law ..... 93

What would constitute the share of an elder brother in a house before a partition of property ..... 94

BULLOCKS.—The village *Mahars* cannot claim the skins of draught bullocks dying in the village, but must make them over to the owners of the animals, receiving remuneration for their services in skinning them ..... 69

BULOOTEDARS.—The hereditary officers or servants of a village ..... 69

BURACHI.—Dispute respecting a half share in the jagheer village of ..... 1

CERTIFICATE.—Of special appeal should be precise in stating the matter certified for inquiry ..... 15

CHAMBAR.—One of the hereditary officers or servants of a village, termed Bulootédar... 69

CHILD.—Disputed right to the guardianship of a child between a Mahomedan father and mother ..... 29

CIVIL COURT.—See *Adawlut.*

CLAIM.—A Zillah Judge having rejected a claim under Section III. of Regulation IV. of 1827, because all the property mentioned in the document under which it was brought was not included in it, the Sudder Dewanee Adawlut held that the objection was invalid ..... 39

COLLECTOR.—The manner in which he is to proceed in the resumption of land belonging to Government is that prescribed in Chapter X. of Regulation XVII. of 1827 ..... 72

CONSIDERATION.—In a suit on a bond for which it had not been shown that full consideration had been given, it was held that the claim to the extent admitted by the defendant was not barred ..... 124

CONTRACT.—See *Bond, Consideration.*

CONVEYANCE.—See *Transfer.*

COSTS.—The whole of the costs may be made to fall on the defendant, though only a part of the claim be awarded to the plaintiff ..... 60

COURT.—See *Adawlut.*

PAGE

CREDITOR.—A creditor of an insolvent firm is not bound by an arrangement for the settlement of its debts to which he did not agree, and may claim debts due to it ..... 128

CUSTOM.—See *Usage.*

DAUGHTER.—The right of a divorced Mahomedan mother, who is not of bad character, to the guardianship of a daughter, up to the age of nine years, is superior to that of the father ..... 29

DEBT.—A security may be sued for a debt, it not being obligatory to proceed first against the principal, or against the security and principal together ..... 34

No transfer of property would be good so long as debts are left unpaid ..... 108

Responsibility for the debts of a deceased person of the party who takes his assets ..... 126

A creditor of an insolvent firm is not bound by an arrangement for the settlement of its debts to which he did not agree, but may claim debts due to it .. 128

DECREE.—The law requires that all the facts of a case must be assumed as stated in a decree; and a special appeal cannot be admitted to correct an error in the determination of facts, even if the judgment appear inconsistent with, or contrary to the evidence ..... 46

Nature of the engagement to be entered into under Section LXVII. of Regulation IV. of 1827, to stay a sale in execution of a ..... 113

DEED OF SALE.—See *Sale.*

DEED OF TRUST.—See *Trust.*

DEFENDANT.—The whole of the costs may be made to fall on the defendant, though only a part of the claim be awarded to the plaintiff ..... 60

In a suit to raise an attachment, the *onus probandi* rests on the defendant if the opposite party is in possession ..... 121

DESCENDANTS.—Respective rights of male and female descendants, in respect to inheriting property, according to Hindu law ..... 63

ENCROACHMENT.—Dispute with the Magistrate relating to an encroachment on public ground ..... 19

EVIDENCE.—The law requires that all the facts of a case must be assumed as stated in a decree; and a special appeal cannot be admitted to correct an error in the determination of facts, even if the judgment appear inconsistent with, or contrary to the evidence ..... 46

See *Onus Probandi.*

EXECUTION.—Nature of the engagement to be entered into under Section LXVII. of Regulation IV. of 1827, by a party desiring to stay a sale in execution of a decree ..... 113

PAGE

FACTS.—See *Evidence.*

FAMILY.—Relative rights of descendants in the male and female lines, in respect to inheriting property according to Hindu law ..... 63

When two brothers live apart, but are undivided in interest, the sale of a portion of the family property by one of them, without the consent of the other, is null and void by Hindu law ..... 93

See *Agent, Brothers, Child, Daughter, Descendants, Father, Guardian, Mother, Property, Separation.*

FATHER.—The right of a divorced Mahomedan mother, who is not of bad character, to the guardianship of her daughter, up to the age of nine years, is superior to that of the father ..... 29

By Hindu law, a son cannot sign for his father, without his father's mark, or without a special power from him ..... 31

FEMALE DESCENDANTS.—See *Descendants.*

FESTIVALS.—A Hindu is not entitled to take part in a Mahomedan festival ..... 91

FILE.—A suit having been struck off the file for non-appearance, it was held that the plaintiff was entitled to bring a new action ..... 99

FIRM.—A creditor of an insolvent firm is not bound by an arrangement for the settlement of its debts to which he did not agree, and may claim debts due to it. 128

FORAS LAND.—Waste land let at a trifling rent ..... 156

GAONKEE WUTUN.—See *Wutun.*

GAONKUR.—A villager, Patel, Koolkurnee ..... 111

GOOMASTA.—An agent, deputy factor, or correspondent ..... 63

See *Agent.*

GOVERNMENT LAND.—See *Collector, Land, Resumption.*

GROUND.—Dispute with the Magistrate relating to an encroachment on public ground. 19

GUARDIAN.—The right of a divorced Mahomedan mother, who is not of bad character, to the guardianship of her daughter, up to the age of nine years, is superior to that of the father ..... 29

GUTKOOLEE.—Land which no one can claim under a proprietary or hereditary right.. 25

HINDU LAW.—See *Descendants, Father, Inheritance, Mooktiar, Property.*

HONOURS.—See *Manpan.*

HUKS.—See *Manpan, Wutun.*

IJMUILEE.—Rough village accounts ..... 112

INHERITANCE.—Relative rights of descendants in the male and female lines, in respect to inheriting property ..... 63

PAGE

Responsibility by Hindu law, for the debts of a deceased person, of the party who takes his assets ..... 126

INSOLVENCY.—A creditor of an insolvent firm is not bound by an arrangement for the settlement of its debts to which he did not agree, and may claim debts due to it ..... 128

INSTALMENTS.—See *Bonds, Stamps.*

INSTRUMENTS.—See *Bonds.*

JOINT PROPERTY.—See *Property.*

JUDGMENT.—See *Decree.*

JURISDICTION.—See *Adawlut, Mohurum.*

KHOT.—An hereditary or temporary renter of a village in the Tanna and Rutnagherry Collectorates ..... 31

KOOLKURNEE.—See *Gaonkur.*

KUBOOLAYUTS.—Agreement bonds ..... 32

LAND.—A *Mirasdar* cannot be deprived of *miras* land in consequence of absence from it ..... 42

The manner in which the Collector is to proceed in the resumption of land belonging to Government is that prescribed in Chapter X. Regulation XVII. of 1827 ..... 72

LAW.—See *Hindu Law, Mahomedan Law.*

LIMITATION.—Held that a claim to a *wurshasun* allowance was barred under the Statute of Limitations, because it was brought eleven years after it was due, and because the plaintiff held no written acknowledgment ..... 21

MAGISTRATE.—Some parties having sued the Magistrate on his warning them that their building was encroaching on public ground, they were nonsuited, as they had not established a title, and the *onus probandi* resting on them ..... 19

See *Mohurum.*

MAHAR.—Cannot claim the skins of draught bullocks dying in the village, but must make them over to the owners of the animals, receiving remuneration for his services in skinning them ..... 69

MAHOMEDAN LAW.—See *Daughter, Guardian.*

MALE DESCENDANTS.—See *Descendants.*

MANAGER.—See *Agent.*

MANG.—One of the hereditary officers or servants of a village, termed *Bulootédar* .... 69

PAGE

MANPAN.—Rejection of a claim to *manpan* for the performance of certain religious ceremonies, on the ground of its being optional to have them performed, and the plaintiff not having been called on to perform them..... 142

MIRAS.—The tenure of land-ownership in the Deccan ..... 25

MIRASDAR.—Cannot be deprived of his *miras* land in consequence of absence from it... 42

MOHURUM.—In a claim to precedence in the procession of *taboots* at the *Mohurum*, it was held that the matter was not cognizable by the Civil Court, but came within the jurisdiction of the Magistrate..... 91

Right of dancing round the *ulawa*, or fire-hole, at the *Mohurum*, decided by usage ..... 139

MOOKTIAR.—By Hindu law a son cannot sign for his father without his father's mark, or without a special power from him..... 31

MOOTVULEE.—Suit for the ejection of a person from the office of *Mootvulee* of a *musjid*. 15

MOSQUE.—See *Musjid*.

MOTHER.—The right of a divorced Mahomedan mother, who is not of bad character, to the guardianship of her daughter, up to the age of nine years, is superior to that of the father..... 29

MORTGAGE.—Is not affected by a subsequent sale; and if the deed of mortgage is not in the possession of the purchaser, the mortgage is still in force..... 100

A mortgage bond gives no absolute right in property; and non-possession by an alleged mortgager, unless specially provided for, is presumptive evidence against the truth of an alleged mortgage..... 104

The thing mortgaged must be something positive, and not uncertain and indefinite..... 106

Possession is not necessary to the validity of a *sangiro*..... 117

MULA.—A garden; a piece of garden ground..... 108

MUSJID.—Suit for the ejection of a person from the office of *Mootvulee* of a..... 15

NON-APPEARANCE.—A suit having been struck off the file for non-appearance, it was held that the plaintiff was entitled to bring a new action..... 99

NON-POSSESSION.—See *Possession*.

ONUS PROBANDI.—Certain parties having sued the Magistrate on his warning them that their building was encroaching on public ground, they were non-suited, as they had not established a title, and the *onus probandi* resting on them..... 19

In suits to raise attachments, the *onus probandi* rests on the defendant if the opposite party is in possession..... 121

PARTITION.—A brother cannot sell or mortgage his share in family property before a partition takes place..... 94

PAGE

PLAINT.—A Zillah Judge having rejected a claim under Section III. of Regulation IV. of 1827, and because all the property mentioned in the document under which it was brought was not included in it, the Sudder Dewanee Adawlut held that the objections were invalid ..... 39

PLAINTIFF.—A suit having been struck off the file for non-appearance, it was held that the plaintiff was entitled to bring a new action ..... 99

POSSESSION.—The claim of a person to share equally with his cousin in a third share of a *wutun* was rejected, on the ground that the cousin was in possession of the whole of the share for four years without the claimant questioning his tenure ..... 45

A mortgage is not affected by a subsequent sale; and if the deed of mortgage is not in the possession of the purchaser, the mortgage is still in force..... 100

A mortgage bond gives no absolute right in property; and non-possession by an alleged mortgagee, unless specially provided for, is presumptive evidence against the truth of an alleged mortgage..... 104

Is not necessary to the validity of a *sangiro* ..... 117

In suits to raise attachments, the *onus probandi* rests on the defendant, if the opposite party is in possession..... 121

POWER OF ATTORNEY.—See *Mooktiar*.

PROOF.—See *Onus Probandi*.

PROPERTY.—A younger brother, as agent or manager, is competent to mortgage family property in the absence of his elder brother; and, even if no partition has taken place, he can still mortgage his brother's share..... 24

A *mirasdar* cannot be deprived of his *miras* land in consequence of absence from it..... 42

Held in a claim to a right of way over ground falling under the eaves of a building which the plaintiff had sold, that as the right existed before the sale, and was not expressly conceded in the deed of sale, it must be presumed that it was reserved..... 49

Relative rights of descendants in the male and female lines in respect to inheriting property according to Hindu law..... 63

When two brothers live apart, but are undivided in interest, the sale of a portion of the family property by one of them without the consent of the other is null and void by Hindu law..... 93

What would be considered the share of an elder brother in a house before a partition of property..... 94

A mortgage is not affected by a subsequent sale; and if the deed of mortgage is not in the possession of the purchaser, the mortgage is still in force. 100

A mortgage bond gives no absolute right in property; and non-possession by an alleged mortgagee, unless specially provided for, is presumptive evidence against the truth of an alleged mortgage..... 104

The thing mortgaged must be something positive, and not uncertain and indefinite..... 106

No transfer of property would be good so long as debts are left unpaid..... 108

PAGE

Absence does not affect a proprietary title ..... 110

Responsibility by Hindu law for the debts of a deceased person of a party who takes his assets ..... 126

PRINCIPAL.—A security may be sued for a debt, it not being obligatory to proceed first against the principal, or against the principal and security together.... 34

PRIVILEGES.—See *Manpan, Wutun.*

PUBLIC GROUND.—Dispute respecting an encroachment on ..... 19

RE-ADJUDICATION.—A matter already adjudicated in a suit cannot be re-adjudicated.. 132

RELIGIOUS CEREMONIES.—Rejection to a claim to *manpan* for the performance of certain religious ceremonies, as it was optional to have them performed, and the plaintiff had not been called on to perform them ..... 142

RELIGIOUS LAW.—Usage takes precedence of ..... 139

RESUMPTION.—The manner in which the Collector is to proceed in the resumption of land belonging to Government is that prescribed in Chapter X. of Regulation XVII. of 1827 ..... 72

REVENUE.—See *Abkaree.*

RIGHT OF WAY.—Disputed claim to a ..... 49

RIGHTS.—See *Adoption, Agent, Brothers, Child, Daughter, Descendants, Family, Father, Guardian, Inheritance, Land, Mahar, Mirasdar, Mohurum, Property.*

SALE.—A mortgage is not affected by a subsequent sale; and if the deed of mortgage is not in the possession of the purchaser, the mortgage is still in force... 100

A deed of sale must be stamped ..... 104

Nature of the engagement to be entered into under Section LXVII. of Regulation IV. of 1827, by a party desiring to stay a sale in execution of a decree ..... 113

See *Deed of Sale.*

SANGIRO.—Possession is not necessary to the validity of a *sangiro* ..... 117

A pledge for a loan, which is only surrendered in the event of principal and interest not being paid according to agreement ..... 120

SECURITY.—A security may be sued for a debt, it not being obligatory to proceed first against the principal, or against the principal and security together..... 34

SEPARATION.—A brother cannot sell or mortgage his share in family property before a partition takes place ..... 94

SHETEE.—An hereditary officer of a village, town, or city, having the superintendence and regulation of traffic ..... 45

SIGNATURE.—By Hindu law a son cannot sign for his father without his father's mark, or without a special power from him ..... 31

SKINS.—The village *Mahar* cannot claim the skins of draught bullocks dying in the village, but must make them over to the owners of the animals, receiving remuneration for his services in skinning them ..... 69

PAGE

SON.—The authority of a husband is not essential to the validity of the adoption of son by a widow of the Nagur Brahmin caste ..... 1
See *Signature.*

STAMPS.—It is unnecessary to sue on a stamp that will cover the whole amount of an instalment bond in seeking such instalment or instalments as may be due at the time of suing ..... 87
A deed of sale must be stamped ..... 104

SPECIAL APPEAL.—A certificate of special appeal should be precise in stating the matter certified for inquiry ..... 15
The law requires that all the facts of a case must be assumed as stated in the decree; and a special appeal cannot be admitted to correct an error in the determination of facts, even if the judgment appear inconsistent with, or contrary to evidence ..... 46

SUIT.—A Zillah Judge having rejected a claim under Section III. Regulation IV. of 1827, and because the property mentioned in the document under which it was brought was not included in it, the Sudder Dewanee Adawlut held that the objections were invalid ..... 39
The whole of the costs may be made to fall on the defendant, though only a part of a claim be awarded to the plaintiff ..... 60
A suit having been struck off the file for non-appearance, it was held that the plaintiff was entitled to bring a new action ..... 99
A matter already adjudicated in a suit cannot be re-adjudicated ..... 132

SURUNJAM.—An assignment of land or villages held on the condition of military service ..... 89

TABOOT.—See *Mohurum.*

TAX.—See *Abkaree.*

TIKAN.—A field, or plot of ground of any kind ..... 32

TITLE.—See *Land, Property.*

TRANSFER.—No transfer of property would be good so long as debts are left unpaid ... 108

TRUST.—If A and B entrust their brother C with monies for certain religious purposes, and he fail to carry out their intentions, the only claim that D, the heir of A, as head of the family, has against him, is the enforcement of the deed of trust ..... 95

ULAWA.—Right of dancing round the *ulawa,* or fire-hole, at the *Mohurum,* decided by usage ..... 139

USAGE.—Takes precedence of religious law ..... 139

WIDOW.—Of the Nagur Brahmin caste may adopt a son without having obtained the authority of her husband ..... 1

PAGE

WURSHASUN.—Held that a claim to a *wurshasun* allowance was barred under the Regulation of Limitations, because it was brought eleven years after it was due, and because the plaintiff held no written acknowledgment..... 11

WUTUN.—Disputed claim to a share in, and signification of the term..... 45

The village *Mahar* cannot claim the skins of draught bullocks dying in the village, but must make them over to the owners of the animals, receiving remuneration for his services in skinning them..... 69

Absence does not affect the proprietary right in..... 110

Rejection of a claim to *manpan* for the performance of certain religious ceremonies, as it was optional to have them performed, and the plaintiff had not been called on to perform them..... 142

YUJMANVRITEE.—The office and remuneration of a family priest..... 63

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